Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1999

RENE M. DARBY,

and

DIRECTOR,

OFFICE WORKERS' COMPENSATION PROGRAMS,

Petitioner,

vs.

INGALLS SHIPBUILDING, INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court previously established in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), guidelines to govern the award of attorney's fees in cases adjudicating irrevocably intertwined claims for relief. The necessity of complying with established guidelines concerning awards in irrevocably intertwined cases is of particular importance to that class of claimants who are returned to work under the Longshore and Harbor Workers' Compensation Act ("Longshore Act"), 33 U.S.C. §901 *et seq.*, and subsequently reinjured in the course of employment. The lack of adequate administrative procedures within the Department of Labor requires that this class of reinjured workers simultaneously prosecute multiple injury claims in order to protect their interests, with the result being the incursion of extensive legal expenses. The resulting legal expenses are usually challenged by employers after the reinjured worker successfully prosecutes the injury claims, in spite of the fact that employers manipulate this administrative oversight in order to delay final adjudication of these claims in their entirety. Although this Court crafted appropriate guidelines in *Hensley* for situations involving interrelated claims, there is not uniform adherence to these guidelines by the courts and agencies administrating the Longshore Act. The result is that the class of workers reinjured after returning to work are at risk of being deprived of legal representation necessary for the protection of their work-injury claims and future interests.

The Questions Presented are:

1 . Does the award of concurrent permanent disability benefits for multiple interrelated Longshore Act claims constitute the successful prosecution of intertwined claims

or otherwise require adherence by an adjudicating body to the guidelines and procedures set forth in Hensley v. Eckerhart?

2. Does an adjudicating body deny the right of counsel to a specific class of Longshore Act claimants when it fails to award attorney's fees to reinjured claimants for the successful prosecution of multiple work-related injury claims

3. Does an appellate court of the United States have the authority to ignore and thereby suspend the operation of the Federal Rules of Appellate Procedure and its own local rules, in order to preclude the filing of a timely suggestion for *en banc* consideration of a dispositive issue in an appeal?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioner in this case is Rene Darby. He was the claimant in two (2) work-related injury claims administrated by the Office of Workers' Compensation Programs, and an appellant before the Benefits Review Board and the United States Court of Appeals for the Fifth Circuit. In the appeal before the Fifth Circuit, the Director of the Office of Workers' Compensation Programs was aligned with the Petitioner.

The Respondent is Ingalls Shipbuilding, Inc., believed to be a wholly owned subsidiary of Litton Industries. The Respondent was the employer of Rene Darby at all times relevant to these claims.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

PARTIES TO THE PROCEEDING AND
RULE 29.6 STATEMENT.....iii

TABLE OF AUTHORITIES.....vi

OPINION BELOW.....2

JURISDICTION.....2

STATUTORY PROVISIONS INVOLVED.....2

STATEMENT OF THE CASE.....3

A. Introduction and Summary.....3

B. Statement of the Facts.....7

REASONS FOR GRANTING THE WRIT.....12

The Failure of the Fifth Circuit to Follow the Directives of this Court Concerning Fee Awards under Federal Statutes Undermines Injured Workers' Right to Counsel.....12

1. The Fifth Circuit failed to adhere to guidelines established by this Court regarding the award of attorney's fees in instances of irrevocably intertwined claims.....13

2. The failure of the Fifth Circuit to award attorney's fees in this instance constitutes an impermissible interference with a Longshore Act claimant's right to counsel.....18

3. It was improper for the Fifth Circuit to ignore the provisions of Federal Rule of Appellate Procedure 35 and thereby deny the right to file a timely petition for *en banc* review of those orders in conflict with the decisions of this Court.....22

CONCLUSION.....24

TABLE OF AUTHORITIES

Case law

Alyeska Pipeline Co. v. Wilderness Society
421 U.S. 240 (1975).....20

Battle v. A.J. Ellis Construction Co.,
16 BRBS 329.....15

Bullock v. Ingalls Shipbuilding, Inc.,
27 BRBS 90 (1993).....21

Cabral v. General Dynamics,
13 BRBS 97 (1981).....14

Charlotte-Mecklenburg Board of Education,
66 F. R. D. 483 (W. D. N. C. 1975).....15

Cherry v Newport News Shipbuilding & Dry Dock Co.,
8 BRBS (1978).....14,15

George Hyman Construction Co. v. Brooks,
963 F.2d 1532 (D.C. Cir. 1992).....16,20

Gray v. New England Telephone and Telegraph Co.,
792 F.2d 251 (1st. Cir. 1986).....20

Hensley v Eckerhart,
461 U.S. 424 (1983).....*passim*

Hilyer v. Morrison-Knudsen Construction Co.,
12 BRBS 87 (1980).....15

Hole v. Miami Shipyards Corp.,
640 F.2d 769 (5th Cir. 1981).....16

International Mercantile Marine Co. v. Lowe,
93 F.2d 663 (2nd Cir. 1938).....21

Krakoff v. United States,
431 F.2d 847, aff'd, 439 F.2d 1023 (6th Cir. 1971).....24

Marcum v. Director, OWCP,
12 BRBS 355 (1980).....14

Martin v. Lauer,
686 F.2d 24 (D.C.Cir. 1982).....*20*

Nooner v. National Steel & Shipyard Co.,
19 BRBS 43 (1986).....15

Savannah Machine & Shipyard Co. v. Director,
642 F.2d 887, 889 (5th Cir. 1981).....14

Schiavone v. Fortune,
750 F.2d 15 (3rd Cir. 1984), cert. granted, 474
U.S. 814, aff'd, 477 U.S. 21 (1986).....23

Snowden v. Ingalls Shipbuilding, Inc.,
25 BRBS 245 (1991).....14

U.S. Department of Labor v. Triplett,
494 U.S. 715, 110 S.Ct. 1428 (1990).....21

Statutes

28 U.S.C. §1254(l).....2

33 U.S.C. §908(f).....2

33 U.S.C. §922.....2

33 U.S.C. §928.....2

Court Rules

Federal Rule of Appellate Procedure 35.....22

Local Rules of the Fifth Circuit 35.2 and 35.6.....23

IN THE
SUPREME COURT OF THE UNITED STATES

RENE M. DARBY
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DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Petitioners

vs.

INGALLS SHIPBUILDING, INC.
Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Rene M. Darby ("Darby") hereby petitions this Court to grant a writ of certiorari to review the judgments and actions of the United States Court of Appeals for the Fifth Circuit in Cause Nos. 96-60029 and 99-60567, the judgments at issue being the order of June 11, 1999, the order denying rehearing dated July 13, 1999, the August 19, 1999 order denying leave to file a timely received suggestion for *en banc* consideration, and the order of December 2, 1999 dismissing the appeal from the 1999 Benefits Review Board as frivolous.

OPINIONS BELOW

The orders of the Fifth Circuit Court of Appeals issued in Cause No. 9260029 are reprinted in the Appendix at la-3a. The initial 1996 opinion of the Fifth Circuit in that matter is reported at 99 F.3d 685 and reprinted in the Appendix at 6a-13a. The opinions of the Office of Administrative Law Judges establishing the Darby's entitlement to fee awards are reprinted in the Appendix at 14a-67a. The December 2, 1999 order of the Fifth Circuit Court of Appeals in Cause No. 99-60567, dismissing the review of the Benefits Review Board's order denying attorney's fees, is reprinted in the Appendix at 4a-5a. The August 20, 1999 opinion of the Benefits Review Board, as appealed in Cause No. 9960567, is reprinted in the Appendix 68a-72a.

JURISDICTION

The order of the Court of Appeals for the Fifth Circuit denying the March 26, 1999 fee petition in Cause No. 92-60029 was filed on June 11, 1999. Pet. App. 1 a. Darby filed a timely request for rehearing by the panel, which was denied on July 13, 1999. Pet. App. 2a. A petition for review of a Benefit Review Board denying a related claim for attorney's fees was filed with the Fifth Circuit on August 24, 1999 and assigned Cause No. 99-60567. This cause was dismissed on December 2, 1999, for the stated reason that the appeal was frivolous. Pet. App. 4a-5a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(l).

STATUTORY PROVISIONS INVOLVED

The pertinent sections of 33 U.S.C. §901 et seq. ("Longshore Act"), specifically §§ 908(f), 922 and 928, are

reprinted in the Appendix at 75a-78a.

STATEMENT OF THE CASE

A. Introduction and Summary

This case results from the denial of fee petitions filed with the Fifth Circuit Court of Appeals and the Benefits Review Board for legal services rendered in a successful prosecution of intertwined claims for permanent disability benefits under the Longshore Act. The case involved multiple injuries and irrevocably interrelated claims for benefits due to disabling neck and back injuries, which the treating physician addressed as one injury because of interrelation through aggravation and reinjury. The failure of the Department of Labor and its Office of Workers' Compensation Programs to implement adequate and expeditious procedures to consolidate and adjudicate multiple pending work-injury claims under the Longshore Act resulted in Darby being required to simultaneously prosecute multiple claims for benefits before different agencies and courts. Darby ultimately received a concurrent award of permanent disability benefits from the Office of Administrative Law Judges for his claims arising from the initial 1987 injury and his 1992 reinjury. Because Darby was required to simultaneously prosecute multiple interrelated claims, the employer opposed the fee petitions related to the initial work injury as being unnecessary. Both the Fifth Circuit Court of Appeals and the Benefits Review Board accepted the employer's argument. This action was in disregard of the administrative law judge's specific award of concurrent benefits for both injuries. Pet. App. 61 a and 65a. The denial of these fee petitions by the Fifth Circuit and the Benefits Review Board was also in contradiction and disregard of the directives contained in *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

Section 8(f) of the Longshore Act clearly anticipates that a certain class of injured workers will be returned to work in lieu of compensatory benefits and that this class of workers will be reinjured. In spite of the statutory anticipation of further injury, the Department of Labor has not implemented administrative procedures that would protect this class of injured workers by consolidating multiple claims simultaneously pending before different agencies or courts, and thereby lessening a claimant's need for and the resulting expense of simultaneous legal representation. A lack of adequate administrative procedures makes it necessary for this class of claimants to prosecute independently a series of irrevocably intertwined injury claims before different agencies and courts, until such time as those claims on appeal can be remanded to the appropriate agency for further fact finding and the award of benefits.

In instances where multiple interrelated claims are pending before different agencies or courts, an employer can both forestall the final adjudication of the respective injury claims through attrition in hopes of obtaining both a beneficial settlement of these claims and, after attorney's fees are granted, seek a reduction or disallowance of the fee award by alleging that multiple prosecutions of the claims were not necessary. This type of defense is contrary to the Longshore Act's intent and purpose of protecting injured workers and providing them with adequate legal representation for their injury claims. Such manipulation of administrative practices also discounts and undermines the requirement that a claimant under the Act obtain benefits for a specific injury in order to protect the right to future modification under Section 22. Denying the payment of necessary legal fees to a successful claimant's attorney also risks driving competent counsel from the field of representing injured maritime

workers. Such a deprivation of legal representation could ultimately result in assertions against the Department of Labor that the fee award provisions of the Longshore Act are administrated in an unconstitutional manner.

This Court previously addressed in *Hensley* the issue of statutory fee awards in instances of irrevocably intertwined injuries which necessitate independent prosecutions but may not produce readily apparent benefits. Where a party's injuries or claims become irrevocably intertwined, an equitable consideration of both claims is required in regard to any relief granted for his injuries. In many instances a claimant may be forced to seek relief that is related to the core claim which, by itself, does not produce a tangible result or readily apparent benefits but, when viewing the entire claim and those related issues, may be necessary. This is particularly true in this instance, where Darby suffered intertwined neck and back injuries between 1987 and 1992, in addition to an arm injury sustained in conjunction with the initial 1987 neck injury. The administrative procedures of the Office of Workers' Compensation Programs required that both injury files be prosecuted independently before different agencies in order to obtain appropriate benefits for these injuries and to preserve the right to future modification of the benefit awards.

Events occurring during the spring of 1992 necessitated both the appeal of the March 20, 1992 administrative decision and the separate prosecution of those claims arising from the new injury. It would have been prejudicial to Darby's interests to abandon all rights and claims related to the 1987 OWCP file. Ethical considerations also precluded his attorney from advising him to abandon the initial 1987 claim. Past conduct by the employer clearly indicated that

there would be a full controversion of all claims alleging a loss of wage-earning capacity and permanent disability. The interrelated nature of these injuries would have also given the employer an extremely attractive opportunity to allege opportunistic defenses if the 1987 OWCP claim had been abandoned. In circumstances such as these, it is well -established that a claimant is entitled to full compensation of necessary legal services.

This Petition does not present a situation which urges the expansion or reversal of present statutory or interpretive law. The primary issue presented is very simple: was the Fifth Circuit required to adhere to the directives of the *Hensley* decision and either 1) grant Darby a fee award for legal services rendered during his appeals of those claims set referenced in the 1987 OWCP file, or 2) comply with the directives in *Hensley* which require a sufficient and reasoned explanation concerning those fees which are denied or reduced in irrevocably intertwined claims? The administrative record shows that Darby received concurrent permanent disability benefits for both the 1987 and 1992 injuries. Clearly there was substantial success on both claims. If the Fifth Circuit interpreted the benefit award differently from the clear language of the administrative decisions, the court was still required to make a proper analysis of the fee petitions and provide an adequate explanation of its rationale for denying or reducing the fee. To allow the Fifth Circuit's decisions on this issue to stand without reversal or clarification will provide maritime employers with precedent to make future challenges to the fee petitions of that class of injured workers having multiple intertwined injuries. For this reason, the Court should use this opportunity to provide guidance to both claimants and employers governed by the Longshore Act as to whether awards of concurrent benefits

in interrelated injury claims substantiate the payment of a claimant's necessary fees resulting from multiple prosecutions.

B. Statement of the Facts

The orders at issue in this Petition relate to attorney fee petitions filed for legal services provided Darby during the period of 1992 to 1996 in his appeal of the administrative order denying permanent benefits for non-scheduled injuries sustained in 1987. On November 13, 1996, the Fifth Circuit Court of Appeals remanded the 1987 claim to the Office of Administrative Law Judges due to errors in the determination of Darby's loss of wage-earning capacity, Pet. App. 6a-13a. After remand Darby successfully prosecuted concurrent claims for permanent disability benefits due to his 1987 and 1992 injuries. Pet. App. 61a. Pursuant to an award of attorney's fees, appropriate fee petitions were filed with the Fifth Circuit Court of Appeals and the Benefits Review Board for legal services rendered in Fifth Circuit Cause No. 92-60029 and BRB No. 92-1547, respectively.

On June 11, 1999 the circuit court denied Darby any compensation for legal services related to the 1996 appeal. Pet. App. la. The order did not explain the disregard of the disability benefits obtained on remand or why there was no obligation to comply with the mandate and procedures set forth in *Hensley v. Eckerhart, supra.* A timely petition for rehearing was filed with the Fifth Circuit panel setting forth specific reasons why a fee award was required in this instance. The petition for rehearing was denied by the panel on July 13, 1999, again without explanation of the panel's rational or its failure to consider the conflict between its order and those decisions by this Court which controlled the

matters at issue. Pet. App. 2a. A timely suggestion for *en banc* consideration was filed on July 26, 1999. The clerk of the Fifth Circuit initially refused to file the *en banc suggestion* for the stated reason that this pleading did not address a dispositive issue. The clerk's action was in disregard of the fact that the request for en banc consideration was filed within the fourteen (14) day period specified in the Federal Rules of Appellate Procedure and that it complied with all applicable federal and local appellate rules governing *en banc* proceedings. The *en banc* pleadings were return to the clerk and the propriety of his failure to file the suggestion challenged. The clerk referred the matter to the panel and an order was signed by a single judge of the panel on August 19, 1999, which denied the Petitioner leave to file the suggestion for *en banc* consideration. Pet. App. 3a. No explanation was given by the court for its failure to adhere to the Federal Rules of Appellate Procedure governing the filing of an *en banc* suggestion.

Regarding the fee petition filed with the Benefits Review Board for legal services provided in BRB No. 92-1547, the Board initially denied the entire fee petition on May 24, 1999. There was no explanation by the Board as to why it ignored the concurrent award of permanent disability benefits or why it was not required to comply with the procedures set forth in *Hensley*. A timely motion for rehearing was filed with the Board. On August 20, 1999, the Board denied the fee petition but did attempt to explain its decision. Pet. App. 68a-72a. Unfortunately the explanation was a misapplication of controlling authority and evidenced an attempt by the Board to engage in impermissible fact-finding in order to justify its opinion. A petition for review was filed with the Fifth Circuit Court of Appeals on August 24, 1999, and the fee petition with the Board was assigned Cause No.

99-60567 by the Fifth Circuit. Darby designated the Board's failure to recognize his concurrent disability award, its attempts at factfinding and its effective denial of the right to counsel as issues for review.

On October 27, 1999, the employer moved the Fifth Circuit to dismiss the appeal of the Board's order in Cause No. 99-60567. The employer relied on the court's prior denial of the fee petition in Cause No. 99-60567 as grounds for asserting a frivolous appeal. Although other issues besides entitlement to a fee award were presented to the Fifth Circuit in this second cause, the court again avoided resolving the conflicts concerning a fee entitlement by dismissing the petition for review on December 2, 1999. Pet. App. 4a-5a. This order failed to address any of the issues designed on appeal from the Benefits Review Board or previously presented in Fifth Circuit Cause No. 96-60029.

Darby's initial disability claim originated as a result of injuries sustained on September 24, 1987 in the course of his employment. The injury was assigned OWCP No. 6-110624. At the time of the 1987 accident, Darby was a twenty-three (23) year old shipyard worker in robust health. During the next three (3) years, surgery was necessary for an ulnar transposition in the left elbow and two (2) levels of cervical fusion caused by the work injury. In spite of admonitions by the treating physician against further employment at a shipyard, the employer returned Darby to work at its facility in October 1990. After an October 1991 hearing before the Office of Administrative Law Judges, the presiding judge ruled that the proffered job constituted suitable employment and denied permanent disability benefits for unscheduled injuries to his neck.[1] A timely appeal of this

1 However the administrative law judge did award permanent disability benefits for injuries sustained to the left arm.

decision was filed with the Benefits Review Board, which upheld the administrative law judge's findings. An appeal of the Board's decision was filed with the Court of Appeals for the Fifth Circuit. In the appeal, the Director of the Office of Workers' Compensation Programs was aligned with Darby. On November 13, 1996, the Fifth Circuit held that the administrative law judge had failed to make a proper determination of Darby's post-injury wage-earning capacity and remanded the case to the Office of Administrative Law Judges for further findings consistent with the opinion.

As anticipated by the treating physician, shipyard work proved too strenuous due to Darby's physical limitations. He suffered further injury to his pre-existing neck injuries in a work-related accident on May 8, 1992. He also sustained a new back injury in this accident. The 1992 accident was assigned OWCP No. 6-145508. A lack of adequate procedures for the consolidation and joint adjudication of related injury claims required Darby to prosecute OWCP Nos. 6-110624 and 6-145508 separately in order to protect his rights under the Longshore Act. It was suspected that the employer would alleged defenses arising from OWCP No. 6-110624 as procedural bars against the claims in OWCP No. 6-145508, if the 1987 claims were abandoned. This suspicion was not without merit, as the employer had controverted liability on September 8, 1992 for cervical injuries diagnosed after the May 1992 accident. Additionally the employer had previously attempted to interpose opportunistic defenses in response to the 1987 claim.[2]

After the remand of the 1987 claim by the Fifth Circuit Court of Appeals, the 1987 and 1992 OWCP files

2 The employer previously attempted at a 1991 deposition of the treating physician to allege that Darby's cervical injuries resulted from tilting his head back too far while being shampooed.

were consolidated for hearing. The sole claim presented after remand was a claim of entitlement to permanent disability benefits resulting from the intertwined cervical injuries sustained in the 1987 and 1992 accidents. The respective claims involved injuries to either the same or adjoining cervical levels. Darby suffered disc damage in the 1987 accident, resulting in cervical fusions at C4-5 and C5-6. This accident also caused permanent disability to the left arm. On April 4, 1990, the treating physician observed further disc problems at C6-7. He subsequently determined that Darby had exacerbated the injury at C6-7 and suffered an new back injury at an adjoining cervical level in the 1992 accident. Since 1990 Darby has been diagnosed as having thoracic defects that are essentially inoperable.

The administrative law judge subsequently ruled on April 15, 1998, that the employer had failed to provide suitable alternative employment and that there was a loss of permanent wage-earning capacity due to the combined effect of both injuries. Pet. App. 52a and 58a-59a. The decision awarding benefits did not fully address Darby's rights in the 1987 OWCP claim file, and a motion for clarification of the benefits award was filed. A specific finding was issued on June 25, 1998 which clearly stated that the award of permanent disability benefits was compensation for both the 1987 and 1992 injuries. Pet. App. 65a-66a. Based on this finding, the administrative law judge determined that a *de minimus* award was not necessary for the 1987 injury, as future rights regarding the 1987 injury were protected by his benefit award.

The administrative law judge also ruled that Darbys attorney was entitled to fee awards as a result of his successful prosecution of the disability claims. Pet. App. 60a. Fee

petitions were subsequently filed with the Fifth Circuit Court of Appeals and the Benefits Review Board seeking compensation for legal services provided during the appeal of the 1992 administrative order. Both fee petitions were denied. In both cases presented to it, the Fifth Circuit failed to explain its deviation from the directives in *Hensley v. Eckerhart, supra,* which would be controlling on the issue of an award of attorneys' fees arising from irrevocably intertwined claims. Based upon the issues stated, herein, Darby seeks a Writ of Certiorari from this Court remanding the respective cases to the Court of Appeals for the Fifth Circuit and the Benefit Review Board, with instructions that the petitions for attorney's fees be adjudicated in conformity with the decision in *Hensley.*

REASONS FOR GRANTING THE WRIT

The Failure of the Fifth Circuit to Follow the Directives of this Court Concerning Fee Awards under Federal Statutes Undermines Injured Workers' Right to Counsel

This Court should grant certiorari to consider whether the Fifth Circuit Court of Appeals and the Benefits Review Board complied with the directives set forth in *Hensley v. Eckerhart* in their adjudication of Darby's fee petitions, and whether there was proper consideration of Darby's concurrent permanent disability benefits awards. It is important to conclusively recognize an injured worker's right to counsel and adequate legal representation in contested cases involving multiple injury claims. The right to counsel is reinforced through the payment of necessary legal services that produce successful results. The Longshore Act allows for and offers incentives for an employer to return to

work those claimants with non-scheduled work injuries, and considering that Section 8(f) anticipates reinjury to this class of claimants after their return to work, it is quite logical that the present factual scenario of an injured worker having multiple injury claims pending at the same time will repeat itself in the future. For the benefit of injured claimants and their attorneys, the Court should use this opportunity to craft clear and concise guidelines concerning Longshore Act claimants' right to counsel and their attorneys' obligations when faced with multiple contested injury claims.

1. The Fifth Circuit failed to adhere to guidelines established by this Court regarding the award of attorney's fees in instances of irrevocably intertwined claims.

The administrative law judge's June 25, 1998 order made a specific finding that Darby sustained a loss of wage earning capacity due to both the 1987 injury and the 1992 aggravation. In discussing the effect of the 1992 aggravation on the 1987 injury, the administrative law judge found the award of permanent partial disability to be compensation for both injuries.

> "While under the Act, this [1992] aggravation was a 'new injury,' it clearly arose out of the original 1987 injury. Thus, any present loss in wage earning capacity is a product of the combination of the 1987 injury and the 1992 aggravation ... In other words, the original injuries suffered in 1987 are accounted for in the award of permanent partial disability benefits...In this case, Claimant certainly has a present loss of wage earning capacity, due to both his 1987 injury and his 1992 aggravation." Pet. App. 65a.

The combined effects of Darby's injuries and resulting increase in the level of disability was one reason the administrative law judge provided the employer partial indemnification under Section 8(f) of the Longshore Act. The award of concurrent disability benefits and the discussion of the basis for granting Section 8(f) relief show that a pro rata division of the permanent disability award was not possible.

Section 28(b) of the Longshore Act provides attorney's fees where a "claimant uses the services of an attorney to successfully recover the total amount claimed." *Savannah Machine & Shipyard Co. v. Director*, 642 F.2d 887, 889 (5th Cir. 1981). In providing for attorney's fees, the statutory scheme of the Act recognizes that injured employees will generally require effective representation by counsel to aid them in obtaining the compensation they are entitled to receive, be it large or small. The proper test for determining if the attorney's work is necessary is whether, at the time the attorney performs the work in question, he could reasonably regard the work as necessary to establish entitlement to relief under the Longshore Act. *Cabral v. General Dynamics*, 13 BRBS 97 (1981); *Cherry v- Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS (1978); *Marcum v. Director,* OWCP, 12 BRBS 355 (1980); *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991). Time spent and services rendered on behalf of a claimant that are reasonably necessary to protect a claimant's interest are compensable. *Marcum v. Director*, OWCP, supra; *Hensley v. Eckerhart, supra.*

Where the results obtained constitute the total accomplishment of the aims of the case, a fee award is proper, even if the claimant does not prevail on minor contentions

related to the primary claim. *Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483, 484 (W.D.N.C. 1975). "If work on unsuccessful issues could not be compensated, the quality of the advocacy claimants receive would be adversely affected ... [w]e hold that a determination of the reasonable necessity of professional services cannot be made purely on the basis of whether the work related to an issue on which the claimant was ultimately successful.. All counsel's services can be considered for a fee award, as long as he succeeded in increasing the claimant's entitlement to compensation as provided for in Section 28 of the Act." *Cherry, supra, 8 BRBS at 863-4.*

There is a clear distinction between the failure of a claimant to prevail on related or collateral issues and a failure to prevail on distinctly different or unrelated claims. The determination of compensability for legal services is based on whether the claimant prevailed on his claim and not on every single issue of that claim. *Hilyer v. Morrison-Knudson Construction Co.*, 12 BRBS 87 (1980); *Cherry v. Newport News Shipbuilding & Drydock Co., supra, Nooner v. National Steel & Shipyard Co.*, 19 BRBS 43 (1986). "In most cases, the issues are too intertwined to permit allocation of the fee between successful issues and unsuccessful issues." *Battle v. A.J. Ellis Construction Co.*, 16 BRBS 329, 331 (1984).

Darby was entitled to the payment of his legal fees for work performed before the Fifth Circuit and the Benefits Review Board. The 1987 and 1992 injuries had clearly become irrevocably intertwined before the appeal was perfected to the Fifth Circuit. The employer elected at an early stage of the proceedings to controvert the 1992 cervical injuries and continued its opposition to paying permanent

disability benefits, even after the second injury in 1992. Ultimately there was a finding that Darby had sustained a loss of wage-earning capacity due to both injuries. Pet. App. 65a. The results obtained before the administrative law judge constituted a successful and total resolution of his combined claims. If a counsel is ultimately successful in procuring compensation benefits under the Longshore Act, he is entitled to fees for all services rendered at each level of the adjudication process. *Hole v. Miami Shipyards Corp.*, 640 F.2d 769 (5th Cir. 1981).

This Court's opinion in Hensley v. Eckerhart, supra, discusses the standards for determining a fee award to prevailing parties under federal statutes and the factors that are to be considered in those awards. It also discusses situations in which claims may be intertwined to the point that it is, for all practical purposes, impossible to differentiate them. The analysis *Hensley* uses for establishing entitlement to a fee is as follows: First, did the plaintiff fail to prevail on the claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

Under the *Hensley* analysis, Darby passes the first test. Both claims at issue were solely related to Darby's request for permanent disability benefits resulting from non-scheduled injuries to adjoining cervical levels. If the claims are interrelated, a court is to skip the first step of the *Hensley* inquiry and move to the second step. *The George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 1537 (D.C. Cir. 1992). Darby's loss of wage-earning capacity established in the 1998 administrative decisions will net permanent disability benefits of approximately Two Hundred Eighty

Thousand Dollars ($280,000) during the remainder of his life. These benefits could increase to approximately Six Hundred Thousand Dollars ($600,000) if his wage-earning capacity remains at the post-hearing level and there is modification. Additionally his rights to seek future modification and medical benefits are assured in both claims. Comparing these benefits with the Two Hundred Sixty-six and 625/1000 (266.625) hours spent by his counsel on the appeal of these claims during the five (5) year period between April 3, 1992 and the remand by the Fifth Circuit in 1996, the effort expended on behalf of Darby was both reasonable and necessary.

This Court recognized in *Hensley* that in many instances, a claimant may be forced to seek relief related to the claim which, by itself, does not produce a distinct or tangible result but, when viewing the entire claim and related issues, may be necessary.

> "In some cases ... claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the [ALJ] should focus on the significance of the overall relief obtained by the [claimant] in relation to the hours reasonably expended on the litigation.
>
> Where a [claimant] has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some

> cases of exceptional success an enhanced fee may be justified. In these circumstances the fee award should not be reduced simply because the [claimant] failed to prevail on every contention raised in the lawsuit. Litigants in good faith may raise alternative legal grounds for the desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The results are what matters."

Hensley, at 434-35. This Court further stated that the fact finder should make an equitable judgment based upon all of the circumstances of the litigation. *Id.* at 437.

Justice Brennan wrote in his concurrence with the *Hensley* decision, that defendants generally have an incentive to delay a case in hopes that the delay with force the claimant to give up. "Defendants.. have much to gain by dragging out litigation. The longer litigation proceeds, with no prospect of improved results, the more pressure plaintiffs and their attorneys may feel to compromise their claims or simply give up." *Hensley*, at 456. The primary issue posed in this Petition is the precise danger that Justice Brennan envisioned in his concurrence. When obstacles continuously undermine the efforts of successful claimants to collect fee awards, it is highly probable that lawyers will be reluctant to undertake representation of injured workers under federal workers' compensation statutes. When faced with the inability to collect fees for services rendered, the bar of attorneys representing Longshore Act claimants could dwindle and claimants loose the ability to secure adequate representation.

2. The failure of the Fifth Circuit and Benefits Review Board to award attorney's fees in this instance constitutes an

impermissible interference with a Longshore Act claimant's right to counsel.

Due process and equal protection considerations afforded under the Fifth Amendment require that a litigant be afforded specific rights under the United States Constitution. In the case of an injured worker under the Longshore Act, the claimant is precluded from contracting to personally pay the expense of prosecuting his claim due to the prohibitions in Section 28. This restraint on the right to contract creates tension because of limitations placed a Longshore Act claimant's right to contract with an attorney, whereas no such restraints exist on an employer. This is particularly true when there fails to be a realistic "no fault" administration of injured workers' claims and employers undertake to preclude the award of benefits through aggressive opposition and continuing delay. In these circumstances, an injured worker is very vulnerable to an employer's ability to pay for its legal services promptly and without the restraints imposed on Longshore Act claimants and their attorneys. Under such conditions, a claimant's counsel needs to be assured that established precedent controlling the award of legal fees will be followed and uniformly applied. The right to counsel is of special importance to that class of reinjured workers, such as Darby, who fall under the provisions of Section 8(f). In cases of multiple injury and reinjury, an injured worker is exceedingly vulnerable to an employer's tactics designed to lessen its liability for permanent disability benefits and there needs to be assurance that his attorney will not abandon the case. If counsel cannot be assured of payment for successfully prosecuting irrevocably intertwined claims, injured workers may discover that they are no longer able to obtain adequate representation.

A civil litigant has a constitutional right deriving from due process to retain counsel in a civil case. *Gray v. New England Telephone and Telegraph Co.*, 792 F.2d 251 (1st, Cir. 1986). Impairment of the obligations by an attorney to his client can be unconstitutional under the due process clause because it denies the client access to the courts. *Martin v. Lauer*, 686 F~2d 24 (D.C.Cir. 1982). The failure to pay for Darby's necessary legal services referenced in these fee petitions could substantiate a claim that he and his class of reinjured workers are deprived of rights secured by the Constitution or the laws of the United States, and that the deprivation of those rights were committed under color of law by the respective agencies or courts of the United States. These assertions would fulfill the requirements recognized by this Court that there be both 1) an alleged constitutional deprivation and 2) that the party charged with the deprivation must be an entity rightfully alleged to be a governmental actor. By failing to award attorney's fees in compliance with the directives in *Hensley v. Eckerhart, supra,* the Fifth Circuit and the Benefits Review Board fulfilled the role of a governmental actor by depriving Darby's class of claimants of their right to counsel. In disregard of the concurrent award of permanent disability benefits, the Fifth Circuit interposed its own interpretation on the award and denied Darby payment of legal services provided before that court and the Benefits Review Board. It is beyond the competence of a court to pick and choose among plaintiffs and the statutes under which they seek relief, and to award fees in some cases but not in others. *Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S. 240, 269 (1975).

It is fiction to allege that the failure to pay for necessary legal services on related injury claims does not deprive a claimant of his right to counsel, the right to access the

courts, and the right to freely contract for necessary legal representation. By depriving a claimant's counsel an award of fees in successful claims, there is a substantial risk that other counsel will withdraw from the field of representing injured workers under the federal workers' compensation statutes. In *U.S. Department of Labor v. Triplett*, 494 U.S. 715, 110 S.Ct. 1428, 1434 (1990), Justice Scalia stated that a claim of constitutional violation could be made by showing that attorneys left the field of claimant representation in workers' compensation claims administrated by the Department of Labor due to improper administration of the fee award procedure. By denying a claimant's fee application in cases involving a successful prosecution of multiple injury claims, those legal services necessitated by the injuries are effectively denied to that claimant and future claimants similarly situated. This results in a violation of injured workers' fundamental right to legal representation in Longshore Act claims and further serves as an impermissible restraint of the claimants' right to contract and obtain access to justice.

One purpose of the Longshore Act is to provide a reasonable remedy for the claims of an injured worker. The Act and its implementing regulations are not intended to deprive claimants of legal representation through inconcise guidelines and decisions that are not uniformly applied. To the contrary, the interests of an injured worker are not to be circumvented by reliance on overly technical interpretations of the statute or related authority. *International Mercantile Marine Co. v. Lowe*, 93 F.2d 663 (2nd Cir. 1938). The ethical obligations of a claimant's counsel must also be considered. Once counsel has been properly secured by a claimant, the attorney has an ethical obligation to protect the interests of his client and the potential amount of recovery should not interfere with that ethical obligation. *Bullock v. Ingalls*

Shipbuilding, Inc., 27 BRBS 90 (1993). Where multiple injuries are irrevocably interrelated, it is necessary that the agencies of the Department of Labor and the courts interpreting these statutes follow this Court's decision and guidelines set forth in *Hensley v. Eckerhart, supra*, and not engage in overly technical interpretations of a benefit award or otherwise subjectively formulate parameters designed to preclude benefits which a claimant is entitled.

In support of his assertion that the appeal of the 1992 administrative decision was necessary, Darby would show that the natural progression of his elbow and arm injuries sustained in the original 1987 accident necessitated the filing on May 20, 1999 for a motion for Section 22 modification of the benefits previously awarded for his 1987 arm injuries.[3] If the appeal of the 1987 injury claims had not been successfully prosecuted, the recent motion of modification would have been barred by the statute, which precludes modification of an award if more than one (1) year has passed since the last payment of compensation. The necessity of the 1992 appeal is further substantiated by the employer's subsequent objection to modification. In disregard of the current 1998 benefit award, the employer now alleges that the statute of limitations bars modification of the 1992 benefit award for the arm injuries. Pet. App. 73a-74a. Based on this evidence, there is no question that 1992 appeal was successful in both obtaining appropriate benefits and protecting Darby's right to future benefits.

3. It was improper for the Fifth Circuit to ignore the provisions of Federal Rule of Appellate Procedure 35 and

---

3 As referenced previously, Darby last received compensation in the 1987 OWCP file on March 20, 1992. Footnote 2.

deny the right to file a timely petition for en banc review of those orders in conflict with decisions of this Court

The clerk of the Fifth Circuit Court of Appeals did not have the discretion to refuse to file a suggestion for *en banc* consideration that was submitted within the time period specified by the Federal Rules of Appellate Procedure. Under Rule 35(b)(1), it is necessary that a suggestion for en banc consideration state that the panel decision conflicts with a decision of the United States Supreme Court. This requirement was fulfilled by showing the conflict between *Hensley v. Eckerhart, supra*, and the panel's decision, which disregarded the fact that the Petitioner had succeeded in obtaining disability benefits for his 1987 neck injury and that the two injuries had become irrevocably intertwined. A suggestion for en banc consideration was mailed by US Mail to the clerk on July 26, 1999, the date of filing being within the fourteen (14) day period set forth in the Federal Rule of Appellate Procedure 35(c). There is no published local procedure in the Fifth Circuit that requires an en banc petitioner to first obtain leave of court in order for the clerk to file a petition that is timely. Local Rule 35.2 sets forth the proper form of a suggestion for en banc rehearing. Darby's suggestion of en banc consideration fully complied with the Local Rules. There was no assertion that the filing of the suggestion for en banc consideration was not timely or otherwise barred for failure to comply with applicable rules.

It is not the role of a court to amend or forego procedural rules in accordance with its own policy preferences. *Schiavone v. Fortune*, 750 F.2d 15 (3rd Cir. 1984), *cert granted*, 474 U.S. 814, *aff'd*, 477 U.S. 21 (1986). It was impermissible for the Fifth Circuit to circumvent the applicable court rules in order to achieve a desired result. There is

no dispute that a circuit court can legitimately refuse to allow en banc consideration of procedural or preliminary motions. *Krakoff v. United States,* 431 F-2d 847, *aff'd*, 439 F-2d 1023 (6th Cir. 1971). However the matter at issue in this instance was not a procedural or preliminary matter. Entitlement to attorney's fees was collateral to the disability claim at issue in 1996 appeal. No decision on the claim for attorney's fees could have been made by the Fifth Circuit in conjunction with its 1996 opinion, due to remand of the case for further findings. The fee claim was not ripe for resolution until the administrative law judge awarded attorney's fees. Accordingly the circuit court breached controlling appellate rules and procedures by refusing to file a timely petition for *en banc* determination of the final dispositive issue remaining in Cause No. 96-60029.

Conclusion

For the reasons set forth, this Court should grant the petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted, this the 13th day of December, 1999.

BLEWETT W. THOMAS
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(2)
Supreme Court, U.S.
FILED
99 1029 OCT 1 1 1999

No.

In the Supreme Court of the United States

OCTOBER TERM, 1999

RENE M. DARBY,

and

DIRECTOR,

OFFICE WORKERS' COMPENSATION PROGRAMS,
Petitioner,

vs.

INGALLS SHIPBUILDING, INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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81 pp

APPENDIX INDEX

APPENDIX A
Order Denying Claimant's Fee Petition
Fifth Circuit Court of Appeals
Cause No. 96-60029, dated June 11, 1999.....A-1

APPENDIX B
Order Denying Motion for Reconsideration
Fifth Circuit Court of Appeals
Cause No.96-60029, dated July 13, 1999.....A-2

APPENDIX C
Order Denying Leave to File
Petition for en banc Consideration
Fifth Circuit Court of Appeals
Cause No.96-60029, dated August 19, 1999.....A-3

APPENDIX D
Order Denying Leave to File
Rebuttal to Respondent's Reply to Petitioner's
Response to Respondent's Motion to Dismiss
Cause No. 99-60567, dated December 2, 1999.....A-4

APPENDIX E
Opinion and Order of Fifth Circuit Court of Appeals
Cause No.96-60029, dated November 13, 1996.....A-6

APPENDIX F
Decision and Order Awarding Compensation Benefits
Off ice of Administrative Law Judges
Case Nos. 91-LHC-0049/97-LHC-1556
OWCP Nos. 6-110624/6-145508,
dated April 15, 1999.....A-14

(Index continued)

APPENDIX G
Order Denying Motion for Reconsideration
Off ice of Administrative Law Judges
Case Nos. 91-LHC-0049/97-LHC-1556
OWCP Nos. 6-110624/6-145508,
dated June 25, 1998.....A-63

APPENDIX H
Order Denying Fee Petition
Benefits Review Board
Cause No. BRB 92-1547, dated August 20, 1999.....A-68

APPENDIX I
Employer's Opposition to Modification Office of
District Director OWCP No. 6-110624,
dated October 13, 1999.....A-73

APPENDIX J
Longshore and Harbor Workers' Compensation Act,
Section 8(f)(1) 33 US.C. § 908(f)(1).....A-75

APPENDIX K
Longshore and Harbor Workers' Compensation Act,
Section 22 33 U.S.C. § 922.....A-77

APPENDIX L
Longshore and Harbor Workers' Compensation Act,
Section 28(a) 33 U.S.C. § 928(a).....A-78

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60029

Filed June 11 1999

RENE M DARBY; DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR

Petitioners

v.

INGALLS SHIPBUILDING, INC., Self -Insured Employer

Respondent

Petition for Review of an Order of the
Benefits Review Board

Before SMITH, DUHE, and BARKSDALE, Circuit Judges
BY THE COURT:

IT IS ORDERED that the motion of petitioner for award of attorney's fees is **DENIED.**

IT IS FURTHER ORDERED that the motion of respondent for leave to file a response to the petitioner's reply to the motion for award of attorney's fees, is **GRANTED.**

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60029

Filed Jul 13 1999

RENE M DARBY; DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, U S DEPARTMENT OF LABOR

Petitioners

v

INGALLS SHIPBUILDING-INC, Self-Insured Employer

Respondent

Petition for Review of an Order of the
Benefits Review Board

Before SMITH, DUHE and BARKSDALE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that petitioner's motion for reconsideration of this court's order of June 11, 1999, is **DENIED.**

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60029

Filed Aug 19 1999

RENE M DARBY; DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, U S DEPARTMENT OF LABOR

Petitioners

v.

INGALLS SHIPBUILDING INC, Self-Insured Employer

Respondent

- -

Petition for Review of an order of the
Benefits Review Board

- -

O R D E R:

IT IS ORDERED that the motion of petitioner, Rene M. Darby, for leave to file petition for en banc consideration of the court's order of July 13, 1999, is **DENIED.**

/S/ Jerry E. Smith

JERRY E. SMITH
UNITED STATES CIRCUIT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 99-60567

RENE M. DARBY

Petitioner

vs.

INGALLS SHIPBUILDING, INC; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, US DEPARTMENT OF LABOR

Respondents

Petition for Review of an Order of the Benefits Review Board

Before SMITH, BARKSDALE and PARKER, Circuit Judges

BY THE COURT:

IT IS ORDERED that the motion of the petitioner for leave to file a rebuttal to the respondent's reply to petitioner's response to respondent's motion to dismiss the petition for review as frivolous is **DENIED AS MOOT.**

IT IS FURTHER ORDERED that the motion of the respondent Ingalls Shipbuilding Inc. to dismiss the petition for review as frivolous is **GRANTED**.

FILED: December 2, 1999

APPENDIX E

DARBY V. INGALLS SHIPBUILDING, INC.
Cite as 99 F.3d 685 (5th Cir. 1996)

Rene M. DARBY and Office of Worker's Compensation Programs, United States Department of Labor, Petitioners,

V.

INGALLS SHIPBUILDING, INC., a Self-Insured Employer, Respondent.

No. 96-60029
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Nov. 13, 1996.

Following injured worker's return to employment, he sought permanent total disability compensation under the Longshore and Harbor Worker's Compensation Act (LHWCA), alleging that post-injury position to which he was assigned by employer did not constitute suitable alternative employment, and that he was entitled to additional medical benefits. Administrative law judge (ALJ) awarded claimant various additional medical and compensation benefits, but found that modified joiner position to which claimant was assigned after his return was suitable alternative employment. The Benefits Review Board affirmed

ALJ's order, and claimant petitioned for review. The Court of Appeals, Jerry E. Smith, Circuit Judge, held that: (1) employer's offer of suitable job within partially disabled claimant's current place of work was sufficient to discharge its burden of establishing suitable employment, and employer was not required to prove that job was realistically and regularly available to claimant on the open job market; (2) substantial evidence supported Board's conclusion that employment of claimant in modified joiner position was sufficient to discharge employer's burden under the LHWCA of showing availability of suitable employment; (3) claimant did not establish that modified joiner position was improper on ground it constituted "sheltered employment"; and (4) failure of ALJ to make finding that claimant's actual post-injury earnings fairly and reasonably represented his wage-earning capacity required remand for finding.

Petition granted; affirmed in part; vacated and remanded in part.

Blewett William Thomas, Gulfport, MS, for Darby.

Mark Ambrose Reinhalter, Office of the Solicitor of Labor, Washington, DC, Thomas O. Shepherd, Jr., Clerk, Benefits Review board, Washington, DC, Carol DeDeo, Assoc. Solicitor, United States Department of Labor, Dir., Office of Workers Comp. Programs, Washington, DC, for Director, Office of Worker's compensation Programs, U.S. Department of Labor, petitioner.

Paul B. Howell, Richard P. Salloum, Franke, Rainey & Salloum, Gulfport, MS for respondent.

Petition for Review of an Order of the Benefits Review Board.

Before SMITH, DUHE' and BARKSDALE, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Rene Darby petitions for review of a decision of the Benefits Review Board ("BRB") affirming an order by an administrative law judge ("ALJ") consisting of a Decision and Order Awarding Additional Benefits, all pursuant to the Longshore and Harbor Workers' Compensation Act (the "Act"), as amended, 33 U.S.C. § 901 et seq. We grant the petition in part and vacate and remand in part.

I.

Darby was employed by Ingalls Shipbuilding, Inc. ("Ingalls"), as a joiner and. during the course of this employment, was Injured when he slipped and fell down a flight of stairs. He underwent medical treatment for the sustained injuries, during which time Ingalls paid temporary total disability benefits. Darby returned to work nine months later in the same position and transferred to a different department for a short period of time before returning to the joiner department and later being laid off because of a lack of work.

In October 1990, nearly three years after his accident, Darby returned to Ingalls as a joiner. Because of his physical limitations. however, he was assigned to a modified joiner position with restrictions on his responsibilities to lift and push heavy objects. Darby was instructed by his super-

visor that he was to work within the scope of his restrictions but that he could exercise his own judgment where appropriate. Darby worked without incident in this new capacity for approximately one year.

Following his return, Darby sought permanent total disability compensation under the Act, alleging that his post-injury position at Ingalls did not constitute suitable alternative employment (§ 908(a)) and that he was entitled to additional medical benefits (§ 914(e)). After administrative procedures failed to resolve the parties' differences, an ALJ held a formal hearing on October 2, 1991, and awarded Darby various additional medical and compensation benefits. Of particular consequence to this appeal, however, is the ALJ's finding that Darby's modified 'Joiner position was suitable alternative employment.

II.

[1] We review BRB decisions for errors of law and adhere to the substantial evidence standard that governs the BRB's review of the ALJs factual determinations. *See Odarn Constr. Co. v. United States Dept of Labor*, 622 F.2d 110, 115 (5th Cir.1980), *cert. denied*, 450 U.S. 966, 101 S.CT. 1482, 67 L.Ed_2d 614 (1981). Thus, we must affirm BRB decisions that conclude correctly that the ALJ's findings are supported by substantial evidence and are in accordance with the law. *See O'Keefe v. Smith, Hinchman & Grylls Assoc., Inc.*, 380 U.S. 359. 362--63, 85 S.Ct. 1012, 1014-15, 13 L.Ed.2d 8915 (1965).

A.

[2] Darby first argues that the BRB erred in relying upon

the modified joiner position to establish the availability of suitable alternate employment. According to Darby, an employer should be required to prove that a job offered as suitable alternative employment is realistically and regularly available to the claimant on the open job market. In so suggesting, Darby reads our decision in *P & M Crane Co. v. Hayes*, 930 F.2d 424, 430 (5th Cir.1991), (i) to permit a single job offer to discharge the employer's burden only where the claimant is highly skilled and seeking specialized employment in an area where the number of suitable applicants is small and (ii) to require a demonstration of availability on the open job market where the claimant, as in the instant case, is less skilled.'

We need not decide whether *P & M Crane* should be so construed, as it is inapposite to the instant case. *P & M Crane* dealt with claimants who alleged permanent and total disabilities and whose employers proffered allegedly suitable jobs external to their current place of work, whereas Darby suffers from a partial disability only and was offered a new job within his current place of work. See id. at 427. The BRB has opined, with respect to partial disability cases, that an employer's offer of a suitable job within the partially disabled claimant's current place of work is sufficient to discharge its burden of establishing suitable employment; the employer need not show that the claimant can earn wages in

---

1. Darby notes correctly that *Diosdado v. John Bludworth Marine*, No. 93-05422, 37 F.3d 629 (5th Cir. Sept. 19, 1994) (unpublished), hinted at such an interpretation of *P & M Crane*. but *Diosdado* is factually distinct From the instant case. In *Diosdado*, the claimant was offered a single job external to his current employer, and the employer had failed to demonstrate that the claimant had any reasonable likelihood of obtaining that job. Absent such a showing by the employer, we were not convinced that the employer has discharged his burden adequately.

in the open market. *See Darden V. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224, 226 (1986).

[3] *P & M Crane* did not disturb, and, in fact, cited approvingly the Darden holding. See *P & M Crane*, 930 F.2d at 430. Hence, we find no error in the BRB's conclusion that Ingalls's employment of Darby in the modified joiner position was sufficient to discharge its burden of showing availability of suitable employment.

Properly characterized, Darby's challenge to the modified joiner position thus becomes one of the suitability of the position with respect to his physical constraints. In support of its finding of suitability, the BRB noted that Darby had been granted wide latitude by Ingalls to determine his physical capabilities and to perform his duties in connection with such determinations and that Darby had been instructed to report any conflicts between an assigned job task and his work restrictions to his supervisor. *See Rene W. Darby v. Ingalls Shipbuilding, Inc.* No. 91-LHCA-0049 (Dep't Labor 1992), at 3. The BRB also found sufficient evidence that, to the extent Darby was in fact performing work in excess of his physical limits as suggested by his physicians, he was doing so on his own accord. Id. Finally, the BRB was influenced by Darby's satisfactory performance of his modified job responsibilities for approximately one year prior to the hearing and the juxtaposition of his complaints in close proximity with the ALJ hearing. Id.

The record reveals that the BRB's review of the ALJ's factual findings 'is supported by substantial evidence, and we decline to disturb any credibility inferences. *See Mendoza v. Marine Personnel Co.*, 46 F.3d 498, W (5th Cir-1995) (noting that "[t]he ALJ is the factfinder and is entitled

to consider all credibility inferences.' The ALJs selection among inferences is conclusive if supported by the evidence and the law. The ALJ determines the weight to be accorded to evidence and makes credibility determinations.") (citations omitted).

B.

[4] Darby next argues that the modified joiner position is improper because it constitutes "sheltered employment." Darby points us to the cross-examination testimony of Carl Robinson, Darby's immediate supervisor, in which Robinson answered in the negative Darby's question whether, if Darby were to leave, he would "advertise the position as a light duty joiner to be filled." Darby so interprets Robinson's answer to mean that, were Darby to leave, the position would not be filled at all and urges us to marshal this "compelling evidence" toward the conclusion that "the Employer created this position for the sole and express purpose of escaping liability to the Claimant for his neck and back injuries."

Not only is Darby's interpretation of Robinson's answer questionable, but the remaining eight pages of Robinson's testimony on cross-examination undermines Darby's ultimate conclusion. First, Darby's question of Robinson asked only whether, if Darby were to leave, Robinson would *advertise* Darby's position as a "light duty joiner," not whether Robinson would hire an employee to complete the duties formerly executed by Darby. Robinson's manner of advertising a vacant position does nothing to support Darby's sheltered employment claim. Furthermore, Robinson's remaining testimony makes apparent the

frequency with which joiners work under various restrictions.[2] That the joiner work was tailored to Darby's physical limitations is insufficient to support Darby's contention that the position was sheltered. See *Darden*,18 BRBS at 226. Rather, we find substantial evidence to support the BRB's review of the ALJs finding that Darby's position was part of the regular work performed by his department.

C.

[5,6] Finally, Darby asserts that the ALJ failed to make a finding under 33 U.S.C. § 908(h) that Darby's actual post-injury earnings "fairly and reasonably represent his wage-earning capacity." Under 33 U.S.C. § 908(c)(21), an award for permanent partial disability is based upon the difference between claimant's pre-injury average weekly wage and his post-injury wage earning capacity. The ALJ is permitted to approximate a claimant's wage-earning capacity by using his post-injury actual wages, but only if such actual earnings fairly and reasonably represent his wage-earning capacity. See *Develier v. National Steel & Shipbuilding Co.*. 10 BRBS 649, 660 (1979). Although the BRB said that the ALJ found that Darby's post-injury earnings were representative of his wage-earning capacity, *see Darby* at 5, we find no such determination in the ALJ's decision. Accordingly, we vacate and remand for a finding consistent with § 908(h).

The petition for review is GRANTED, and the decision of the BRB is AFFIRMED in part and VACATED and REMANDED in part.

---

2. Robinson noted: "That happens all the time, though you know, like you have guys that come in, they have a restriction, you know, I done seen that before."

APPENDIX F

U.S. Department of Labor
Office of Administrative Law Judges
Heritage Plaza, Suite 530
111 Veterans Memorial Blvd.
Metairie, LA 70005
(504) 589-6201

In the Matter of		
RENE DARBY, Claimant,	**Case Nos..**	**91-LHC49** **97-LHC-1556**
against	**OWCP Nos.**	**06-110624** **06-145508**
INGALLS SHIPBUILDING, INC., Self-Insured Employer.		

APPEARANCES:

BLEWETT THOMAS, ESQ.
Post Office Box 12484
San Antonio, Texas 78212
On Behalf of the Claimant

PAUL B. HOWELL, ESQ.
Franke, Rainey & Salloum, P.L.L.C.
2605 14th Street
Gulfport, Mississippi 39501
On Behalf of the Employer

BEFORE: RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER AWARDING COMPENSATION BENEFIT'S

This is a claim for compensation benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 901 et. seq., (hereinafter called "the Act") and the governing regulations thereunder. This claim was filed by Rene Darby ("Claimant"') against Ingalls Shipbuilding Incorporated "Employer"). The present claim consists of two OWCP claims. The first and original claim arises out of a 1987 injury suffered in the course of employment with Employer. The original claim was tried before an Administrative Law Judge (ALJ) in 1991. The Decision and Order in that case granted Claimant partial relief but denied permanent total disability. The denial of permanent total disability was appealed to both the Benefits Review Board and the Fifth Circuit Court of Appeals. The original claim is again before the Office of Administrative Law Judges pursuant to the Order entered by the Fifth Circuit on November 13, 1996, in which it was found that the previous ALJ had failed to make a specific determination as to Claimants post-injury wage earning capacity. The second claim arises out of a May 8, 1992 injury which Claimant suffered while working at Employer's facility after his return to a modified work position.

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for resolution. Pursuant thereto a formal hearing was held on Tuesday, December 9, 1997, in Gulfport, Mississippi. All parties were afforded a full opportunity to adduce testimony, offer evidence and submit post hearing briefs.

Post-hearing briefs were received from both parties. Based upon the stipulations of Counsel, the evidence presented, and my observations of the demeanor of the witnesses, I make the following findings of fact, conclusions of law and order.

STIPULATIONS

The Parties have stipulated as follows:

(1) Jurisdiction is not a contested issue as Claimant was employed
as a joiner in the construction of naval vessels;

(2) The date(s) of injury/accident are September 24, 1987 and May
8. 1992;

(3) The injuries were in the course and scope of employment;

(4) There was an Employer/Employee relationship at the time of
accident;

(5) Employer was advised of the injuries on 9/24/87 and 5/8/92;

(6) Notices of Controversion were filed on 7/11/88 and 9/8/92;

(7) No informal conference was held;

(8) The average weekly wages at the respective times of injury were $411.20 (9/24/87) and $412.51 (5/8/92);

(9) Medical Benefits have been paid;

(10) Dates of maximum medical improvement are 10/29/90 and 12/14/95;

(11) Benefits paid:

(a) Injury of 9/24/87
TTD: 4/7/89 through 10/28/90 at $274.13 per week;
PPD: 15% to arm for 46.8 weeks at $274.13 per week;

(b) injury of 5/8/92 TTD: 5/12/92 through 10/2/92 at $275.01
2/22/95 through 1/23/96 at $275.01 8/6/96 through 8/4/97 at $275.01.

ISSUES

The following issues are in dispute:

(1) Nature and extent of disability, if any;

(2) Whether Claimant's post injury wage in 1990 fairly and reasonably represented his wage earning capacity following the 1987 injury;

(3) Employer's entitlement to Section 8(f) relief,

(4) Separation of claims;

(5) Attorney's fees;

(6) Sanctions;

FACTS

Background of Prior Claim

On July 17, 1987, Claimant was hired by Employer as a joiner. While working in that capacity Claimant slipped and fell down some stairs, injuring his elbow and his neck. Claimant was treated by Drs. Warfield, Bishop, Ross, Buckley, Bazzone, Bridges, and Danielson for the effects of his injuries. His treatment included u1nar nerve surgery on his left elbow by Dr. Bishop and repeat left elbow surgery by Dr. Bazzone. Claimant also had an anterior cervical diskectomy and fusion at C4-5 and C5-6 performed by Dr. Bazzone. Claimant was assigned a 15% permanent partial disability to the arm as a result of the elbow condition, and a 10% anatomical impairment due to the cervical condition. Claimant was seen by Dr. William Bridges for an' independent medical evaluation at the request of the Department of Labor. Dr. Bridges concluded that Claimant reached-maximum medical improvement on August 13, 1990, and was restricted from lifting over 30 pounds, performing overhead work for extended periods of time, and from work requiring constant head and neck motion. (EX-27).

During 1990, Claimant continued to complain of numbness in the fingers of his left hand, as well as complaints of back, neck, and upper extremity pain. Claimant sought treatment from Dr. Harry Danielson. Dr. Danielson found that Claimant's reflexes in the upper extremities to be abnormal, which led him to believe that Claimant might have a disk

problem at C6-C7. A subsequent MRI performed on Claimant's thoracic spine on July 25, 1990 led to the diagnosis by Dr. Danielson that Claimant was suffering from a bulging disk at T6-T7. (EX-27). In his deposition, Dr. Danielson drew a causal relationship between Claimant's thoracic back condition and his September 24, 1987 injury. Dr. Danielson believed that Claimant's thoracic spine condition could be treated conservatively and that surgery was not necessary. Moreover, he though that Claimant could remain in his light duty job. He stated that occasional extension and overhead work would be permissible, provided it was not repetitive activity performed all day. As of September 23, 1991, Dr. Danielson assigned a 20-25 percent permanent partial impairment to Claimant's left arm and a 10-15 percent permanent partial impairment to the whole person relative to the two levels in Claimant's back that were fused. Finally, he assigned a 5 percent permanent partial impairment to the whole person for Claimant's thoracic spine condition. Dr. Danielson also admitted that there was a possibility that Claimant's thoracic spine could degenerate further. (EX-27, pp. 8-9).

A functional capacities evaluation was performed in 1990 by Ms. Joan Sapp. The evaluation determined that Claimant was only able to perform light duty work. Ms. Sapp stated that Claimant could lift up to 20 pounds from the floor to his waist, up to 15 pounds from his waist to his shoulder, he could push/pull up to 50 pounds and he could carry 30 pounds. Ms. Sapp noted that Claimant showed good ability to squat, walk and climb stairs. Ms. Sapp opined that Claimant's maximum weight capacities were not compatible with the Department of Transportation's definition of joiner work, which it classified as medium level work. Specifically, medium level work requires the

ability to lift 50 pounds occasionally and 25 pounds frequently. Ms. Sapp also noted that Claimant should be restricted to crawling only 30 feet at one time, he should limit his overhead work, and he should be permitted to alternate positions frequently. Ms. Sapp concluded that she did not believe that Claimant could return to his former job as a joiner. (EX-27).

At the original hearing of October 2, 1991, Claimant stated that he was currently working the same number of hours as he had before he was injured. Claimant also stated that he was earning more money ($12.28 per hour) than he had been before his injury ($10.28 per hour). Claimant also acknowledged that he had good attendance and had not received any disciplinary notices for poor work since returning to work on October 29, 1990. (EX-27, p. 11).

Claimant returned to work with Employer in a modified joiner position on October 29, 1990. Claimant was instructed not to perform activities outside of his limitations. Mr. Carl Robinson, Claimant's supervisor at that time, testified at the original hearing. Mr. Robinson stated that he was shown Claimant's restrictions on his return to work although the only limitation he saw regarded the lifting restriction. Mr. Robinson stated that he learned of the overhead work restriction from Mr. Joe Walker, a vocational rehabilitation counselor. Mr. Robinson testified that he told Claimant that he would place him in the field working with the rest of the crew, but within the scope of his restrictions. Claimant stated that although Mr. Robinson was aware of his restrictions, he still received assignments which required activity above those limitations. Mr. Robinson stated that he and Claimant had a positive working relationship and that he had no complaints about the quantity or quality of Claimant' work. Mr.

Robinson believed that he had suitable work for which Claimant was capable of performing. (EX-27, pp. 11-12).

Mr. Joseph Walker, a vocational rehabilitation counselor, provided an assessment of Claimant's employment opportunities and capabilities. Mr. Walker met with Claimant on November 6, 1990. Mr. Walker reviewed the medical records of Dr. Bridges and Dr. Danielson, as well as Claimant's functional capacities evaluation. Based on Claimant's age, education, vocational background and medical limitations, Mr. Walker believed that Claimant could continue working as a Joiner in the modified capacity arranged for by Employer. Mr. Walker was also retained by the Department of Labor, as part of its OWCP Rehabilitation Division, to monitor Claimant's progress in Employer's return-to-work program. Mr. Walker informed the Department of Labor that Employer had identified suitable work activity for Claimant for his return to work withing his old department and within his craft, albeit in a modified capacity.

Background of Present Claim

Claimant is currently 33 years old, married, and has four children. Claimant stated that he had done some woodworking in high school and before his employment with employer he had worked for Redman Homes for approximately three and a half years. (Tr. pp. 62-63). During his employment with Redman Homes, Claimant did finishing work and plumbing inspections. (Tr. p. 63).

Claimant stated that when he returned to work for Employer in 1990 he was working as a "joiner," which was a position in which he would construct interior walls, bulk

storage areas, and curtain plate. Claimant worked in that capacity for approximately two years. Claimant stated that he was re-injured in May of 1992 while working in a capacity similar to that of a joiner. Claimant stated that he was doing the work of a tack welder in the hull. At that time, Claimant had restrictions of limited use of his left arm, no lifting over 30 pounds, and no overhead work. (Tr. p. 65). Prior to 1992, Claimant stated that he only exceeded these restrictions one time, when he was working with Carl Robinson installing curtain plating. (Tr. p. 66).

On May 8, 1992, Claimant stated that he was pulling a welding line through a ship when he was caused to twist suddenly, which created a burning sensation through his head and neck and all through his arm. Claimant recalls falling to his knees and informing Mr. Richard Gibson that he had been injured. Claimant was taken to the infirmary at Employer's facility and then pulled out of work pending an appointment with Dr. Danielson. (Tr. p. 68). Claimant testified that he went to see Dr. Danielson, who prescribed therapy. Claimant recalls undergoing the rehabilitation therapy and then being released to return to work. Claimant returned to work in October of 1992 and was employed installing bunks on a ship. (Tr. p. 70). Claimant stated that the work of installing bunks included the drilling the pop rivets, which aggravated his arm. Claimant stated that even though this aggravated his previous injury, he stayed with it and as a result, never had a problem with supervisors or never got in trouble for missing work. Claimant was under the impression that he would have pain for the rest of his life and needed to find ways to cope with it. (Tr. p. 70).

Claimant stated that he was chosen as a leadman for a different project. According to Claimant, Mr. Vince Moran

chose him as a leadman partly because he knew that Claimant's arm and hand were bothering him and he would not have to do as much manual work. (Tr. pp. 71-72). Claimant testified that he worked through to the end of this project but his arm was starting to hurt and his hand would become numb to where he had difficulty holding on to a coffee cup. (Tr. p. 72). Claimant eventually went to see Dr. Danielson again on February 7, 1995, who scheduled him for an MRI. Claimant underwent the MRI and when the results came back in, Dr. Danielson again pulled him from work and scheduled Claimant for a myelogram. According to Claimant, Dr. Danielson recommended surgery. Claimant stated that he went to Dr. Smith for a second opinion and Dr. Smith concurred with Dr. Danielson on the need for surgery. Claimant stated that he went ahead and had the surgery and when he was done with the healing process, he returned to work, which was in January of 1996. (Tr. p. 74).

Claimant stated that he was returned to work doing layout work behind the pin shooter. Claimant stated that this job required him to climb over beams to mark things. Claimant stated that he could not physically handle this job and whet to Mr. Bill Thompson, the foreman of the insulation crew and told him so. Claimant also stated that he had an allergic reaction to the insulation for which he was sent to a dermatologist to have checked. Claimant alleges that Employer has never paid the bill for the visit to the dermatologist. (Tr. p. 119). After attempting the insulation job, Claimant stated that he was then sent to "roll tape." Claimant stated that he proceeded to do this job for approximately seven months, when it began to aggravate his condition, at which time he mentioned it to his supervisors. (Tr. pp. 76, 121). After mentioning it three times, Claimant was sent to Employer's infirmary and from there was sent to Dr. Danielson who again

pulled Claimant from work. (Tr. p. 76). Claimant stated that he underwent nerve conduction studies with Dr. Lew who gave him injections. Claimant then returned to Dr. Danielson after obtaining minimal relief with the injections. According to Claimant, he was told by Dr. Danielson that there was nothing more that could be done and he should stay out of the shipyard. (Tr. p. 77).

According to Claimant, he left the shipyard but was later contacted by Ms. Melinda Wiley who told Claimant that there were jobs available to him at Employer's facility. Claimant stated that he was told that there was a job available pulling tape. Claimant stated that he took Dr. Danielson to the facility to show him the tape pulling job and Dr. Danielson concurred with Claimant that the job would aggravate his injury. Claimant testified that after that he did not return to Employer's facility and his benefits were cut off. (Tr. pp. 77-78). Regarding the tape roller job, Claimant stated that the reason the job aggravates his condition is because of the constant pressure from pulling the tape up to the head area. (Tr. p. 97).

Regarding a surveillance tape taken of him during a Mardi Gras parade where he was throwing beads from a float, Claimant admitted that he was riding on the float and throwing beads but he also stated that he only had to reach and grasp beads that were hanging on hooks directly in front of him and that he did not throw the beads on a repetitive basis. Claimant stated that during the second half of the parade he started hurting and sat down. (Tr. pp. 105-106).

Claimant recalled that after deciding not to return to work with Employer he was hired by a friend to be a ground man for an antenna construction. Claimant stated that when he took the job he understood that it was a one-time thing.

(Tr. p. 78). Claimant stated that he made approximately $2300.00 on the job. (Tr. p. 79). Claimant testified that while he was working that job, his niece and nephew moved into a trailer home built by Grand Housing. Claimant was asked to look at the mobile home and when he did, he found it was not set up right. Claimant then contacted Grand Housing about the problems and was, as a result of his in-depth knowledge on the homes, was asked if he would "trim out' houses for them. Claimant agreed and recruited a crew to do the work. (Tr. p. 80).

Claimant stated that with his business, the crew does most of the work and he does not work if he feels like he cannot do it that day or if he feels tired, or if his back starts to hurt. Claimant stated that he sees a chiropractor on a regular basis as that is what was recommended by Dr. Danielson. According to Claimant, he has no intentions of returning to Employer's employ under any circumstances. Claimant stated that his wife would divorce him if he returned. (Tr. p. 81).

Claimant stated that none of his expenses were reimbursed to him by Grand Housing. According to Claimant, he pays himself $250.00 per week from the profits his business earns. Claimant stated that any money that is left over after he pays his employees and himself is reinvested back into the company. Claimant testified that he has so far reinvested $3,395.25 back into the company. Claimant stated that he has bought air guns, generators, and air compressors. (Tr. pp. 131-132). Claimant stated that he will soon have additional expenditures in the form of liability insurance, medical coverage, additional taxes, and the hiring of an accountant. (Tr. pp. 110- 111).

Claimant reviewed a listing of jobs sent to him by Mr. Walker on September 30, 1997. (Tr. p. 85) Claimant stated that the job of "task activity layout work" involved laying out pins that are shot into the walls and ceiling. Claimant testified that he did this job before he started rolling tape and the job involved climbing over various things, which Claimant found that he could not do. (Tr. p. 86). The second job sent to Claimant was that of "bulkhead insulator." Claimant stated that this job was basically no different that "layout" and entailed climbing over various beams and equipment. The third position identified to Claimant was "insulation runner" which entailed unloading a truck full fireproof insulation and stacking them in the warehouse, after which a worker would distribute the material throughout the shipyard by putting six to twelve cases of insulation on a buggy and puffing them throughout the shipyard. Claimant stated that the cart he would be required to pull was heavy and that the man who was doing the job when he was there was under no restrictions. (Tr. pp. 87-88). The fourth position identified was that of "insulation tape seam applicator." Claimant stated that the job required the worker to bend constantly to get underneath beams. Claimant further stated that the job also requires constant use of the hands which he cannot do. (Tr. p. 89).

According to Claimant, he has problems using screwdrivers and hand tools, which he attributes to the effects of multiple neck surgeries on the nerves in his neck. Claimant stated that both his hands will go numb. (Tr. pp. 89-90). The fifth position identified was that of insulation panel cutter. Claimant stated that the job entails cutting insulation panels with a razor knife. Claimant stated that he could do this job, but not on an everyday, all-day basis, as his hands go numb and cramp when using tools. (Tr. p. 90). The sixth position

identified was that of "DC board holder" installer. Claimant stated that this is a job that is only done when a ship is being finished and hence, it is not a job that is done every day throughout the shipyard. Claimant also stated that the job requires constant climbing of the stairs to every compartment. (Tr. pp. 90-91). The seventh position is that of "furniture refinisher' in the trim shop. Claimant testified that this job entails the constant use of drills and sanders. (Tr. p. 91).

Claimant testified that overall, there is no job in the shipyard that he can do on a eight-hour a day, 40 hour per week basis, because there are days when he cannot work as his hands are in significant pain and his neck is restrictively stiff. (Tr. p. 123). Claimant stated that he will not go back to work for Employer, but that he does not want to live off the "system" either, so he will continue to run his own business until there are no more homes to be sold or Grand Housing goes out of business. (Tr. p. 125).

Claimant was also deposed on November 5, 1997. During that deposition, Claimant explained his physical limitations. Claimant stated that on occasion he can work or stack overhead, but he cannot do it on a continual basis. Claimant stated that he could not look up for a prolonged period of time where he was bending his head back. Claimant stated that he can do some ladder climbing but he could not work on a ladder for an extended period of time. Claimant felt that he could do some activities where it required bending, as long as that bending was not constant. Claimant stated that he could often stoop or squat, but not constantly. Claimant stated that he is able to sit for medium periods of time and could stand for long periods of time. (EX-56, pp. 66-67).

Regarding his new company, Claimant stated that, on average, he makes about $250.00 per week. However, Claimant stated that the amount of work every week win vary, so some weeks he will make more than $250.00, and other weeks he will make less. (EX-56, p. 59).

Ms. Barbara Melinda Wiley testified in this matter. Ms. Wiley has worked for Employer for approximately 24 years. Presently, Ms. Wiley woks as the Employee Relations Representative and her duties include assisting people that have been injured at work to get back to work. (Tr. p. 152). Ms. Wiley stated that Claimant, should he return to work, would be accommodated to the best of her ability within the restrictions that his doctor has outlined for him. Ms. Wiley stated that Claimant would be returned to the same classification that he had when he left and Claimant would receive the same hourly rate or greater than when he had left. (Tr. p. 155). Regarding the jobs sent to Claimant that would be available should Claimant return to work for Employer, Ms. Wiley stated that those jobs were more complicated than the tape-rolling job but were not necessarily more difficult. Ms. Wiley stated that she was aware that Dr. Danielson rejected the tape-rolfing job due to its repetitive nature. (Tr. p. 159). Ms. Wiley stated that Claimant, at the time of the report setting forth the available positions, did not meet the criteria to be returned to work as a work leaderman. (Tr. p. 159). Ms. Wiley stated that after August 4, 1997, Claimant was sent a letter asking him to report for an interview. Ms. Wiley stated that Claimant did not report for the interview. (Tr. pp. 165-166). Ms. Wiley stated that Employer continues to have work available for Claimant. (Tr. p. 171).

Mr. Joseph Walker testified in this matter. Mr. Walker is a certified vocational rehabilitation counselor as well as a

certified rehabilitation counselor with the Department of Labor and a contract vocational expert with the Office of Hearing and Appeals of the Social Security Administration. Mr. Walker stated that he was aware of the types of work that would be offered Claimant as well as the restrictions that would be applicable. (Tr. pp. 173-175). Mr. Walker stated that, regarding Claimant's alleged allergies to the fiberglass insulation, the insulation now being used is known as polymide insulation that should not affect Claimant. (Tr. p. 177). Mr. Walker opined that Employer did have suitable alternative jobs available for Claimant within the joiner/insulator department. (Tr. pp. 178, 181). Mr. Walker also stated that the jobs identified would be modified to allow Claimant to perform within his restrictions from a safety standpoint. (Tr. p. 180). Mr. Walker clarified that the jobs identified were modified tasks or functions within the context of the joiner/insulator position and were not specific and permanent jobs. (Tr. p. 18 1). Rather, they were tasks that a person may be assigned to perform one week and then that person may be assigned an alternative task the next week. (Tr. p. 182).

Dr. Harry A. Danielson was deposed on November 3, 1997. Dr. Danielson had previously been deposed regarding the prior claim on September 21, 1991. Dr. Danielson stated that on December 14, 1995, Claimant had reached maximum medical improvement from his cervical fusion. At that time, Dr. Danielson opined that Claimant was vulnerable to repeat injury and should be employed in a light-duty supervisory capacity. Dr. Danielson opined that shipwork was not suitable for Claimant because the working conditions were such that a person was always subject to bumping his head and overhead working was not in Claimant's best interests. (EX-43, p. 9).

Regarding Claimant's employment as a tape roller, Dr. Danielson stated that he viewed a video of the task and, at that time, understood why Claimant became symptomatic from engaging in that activity. Dr. Danielson stated that Claimant could not do that particular job as the activity it entailed aggravated his symptoms. Dr. Danielson stated that the constant repetitive motion caused Claimant strain in the thoracic outlet of his neck. (EX43, p. 11).

Dr. Danielson stated that, regarding post cervical fusion pain from a three level cervical fusion, the amount of pain varies with the patient and the amount of repetitive activities, ranges of motion, and sudden twists. Dr. Danielson stated that looking overhead for long periods of time can be painful. Dr. Danielson stated that motivation will also play a role, as wen as secondary gain, litigation, neurosis, and addictive behavior. Dr. Danielson stated that he attempts to gain an understanding of the patient's history and counsel them appropriately. Dr. Danielson stated that when he has a patient who is willing, cooperative, and motivated, the whole process is made a lot easier. Dr. Danielson felt that in this situation, Claimant was angry with Employer and somewhat paranoid about their intentions, and this made it more difficult to direct Claimant. (EX-43, pp. 17-18).

Regarding Claimant's restrictions, Dr. Danielson stated that Claimant needs to avoid rapid head/neck movements, working overhead, prolonged extension of the head and neck, ladder climbing, repetitive bending, stooping, squatting, and crawling. Dr. Danielson opined that Claimant has a maximum weight lifting limit of 20 to 25 pounds and will need to change positions from sitting to standing to ambulating as his tolerance demands. Due to the two operative procedures on on the left ulnar nerve, Claimant should

avoid repetitive movements with the left upper extremity. Dr. Danielson stated that Claimant should not work on ships under construction unless he was working in a supervisory capacity and should avoid prolonged extension of his head and neck. Dr. Danielson stated that Claimant cannot work in or with insulation due to an allergic reaction. Dr. Danielson felt that Claimant could not work as a tape roller because of the strain to his neck and arms. Dr. Danielson opined that it was not in Claimant's best interests to remain at the shipyard. Dr. Danielson noted that Claimant would be most at risk in situations where he would have to turn or twist rapidly. (EX-43, pp. 18-20). Dr. Danielson repeatedly emphasized that Claimant should avoid repetitive motion overhead. Such repetitive motions would be involved in any overhead work and ladder climbing. (EX-43, pp. 40-52). Dr. Danielson stated that as long as Claimant's work fits within his limitations, whether it be in a supervisory capacity or not, he would release him to do that work. Dr. Danielson also stated that he would encourage Claimant to return to gainful employment. (EX-43, p. 45).

Dr. Danielson stated that he was aware of the prior surgery by Dr. Bazzone and that Claimant had been released as having reached maximum medical improvement in 1990. In light of this, Dr. Danielson opined that his previous injury combined with and contributed to the effects of his injury of May 8, 1992 to make Claimant materially and substantially more disabled than he would have been from the May 8, 1992 injury alone. Dr. Danielson also felt that the increase in Claimant's physical limitations, after his date of maximum medical improvement in 1990, was due to the second injury of May 8, 1992. Dr. Danielson felt that no further surgery was anticipated. (EX-43, pp. 47-48).

Claimant was first seen by Dr. Harry A. Danielson on June 9, 1992. In taking a history from Claimant, Dr. Danielson noted that Claimant has neck pain, shoulder pain, back pain between the shoulders, pain in his arms, numbness in his hands, aching in his toes and legs, and pain in the thoracic area. Dr. Danielson noted that Claimant's pain is brought on or made worse by turning his head to either side, bending his neck down, and bending his neck backward. Dr. Danielson noted that Claimant last worked on May 11, 1992. Dr. Danielson's impression was that Claimant was in need of a cervical and thoracic MRI scans with a special emphasis on T6-7. (EX43, Dep. Ex-8).

On July 9, 1992, Dr. Danielson stated that the cervical and thoracic MRI scans taken on 6/27/92 indicated "something strange" in the bone on the back side in the body of C6 on the T1 weighted image. There appeared to be defects at T3-4 and T6-7 with the situation appearing worse on the left side. Dr. Danielson felt that Claimant needed to have a cervical and thoracic myelogram. The results of the myelogram indicated a post operative interbody fusion at C4-5 and 6. Otherwise, the myelogram was normal. Dr. Danielson noted that the myelogram looked good, although there was a lot of movement on the cervical CT scan. Dr. Danielson noted small spurring at T5-6, and the CT scan showed Claimant to have central disc herniations at L5-S1 and L4-5 although it was not indicated on the myelogram. Claimant reported to Dr. Danielson that he was having a lot of pain in his legs and that sitting up straight caused him pain. (EX-43, Dep. Ex-8).

Dr. Danielson again saw Claimant on September 3, 1992. Claimant reported increased pain between his shoulder blades. Dr. Danielson opined that Claimant had three areas of trouble: the spur at T5-6 and the central disc bulges

at L5-S1 and L4-5, yet none of these were severe enough at that time to warrant operative intervention. (EX-43, Dep. Ex-8).

In a letter to Ms. Pam Clark of F.A. Richard & Associates, Dr. Danielson stated that it was his medical opinion that Claimant's neck pain was an aggravation of a pre-existing problem and that his back pain was causally related to his on-the-job injury of May 8, 1992. In a letter to Richard Hastings of F.A. Richard & Associates, Dr. Danielson stated that, based upon Claimant's history and the absence of other trauma, it was his opinion that with probable medical certainty that the continuing cervical problems and the recent anterior cervical discectomy at C6-7 are related to his on-the-job accident of May 8, 1992. (EX-43, Dep. Ex-8).

Claimant was seen by Dr. Danielson on February 7, 1995, at which time he reported that he was having such neck pain that he could not extend his head to shave. Claimant reported that his neck pain was on the left side. Dr. Danielson stated that he wished Claimant to undergo another cervical and thoracic MRI scan. According to Dr. Danielson, these MRI scans, which were taken on 2/13/95, showed a small central disc herniation at T3/4 and a disc herniation at C6/7. Dr. Danielson ordered another myelogram. On March 23, 1995, Dr. Danielson stated that after viewing the results of the myelogram, Claimant was shown to have a central disc herniation at L5-S1 and a large disc herniation at C6/7 which was pressing upon the spinal cord. Dr. Danielson found a possible minimal herniation of T3/4 to the left of the midline. Dr. Danielson recommended that Claimant get the disc at C6n cleaned out, as he was at risk for spinal cord injury. This procedure was completed on

May 21, 1995. (EX-43, Dep. Ex-8).

Dr. Danielson saw Claimant on August 17, 1995, at which time Claimant reported that when he tries to write, his fingers "get stuck." Dr. Danielson noted that the plug at C6/7 looked good. On December 14, 1995, Dr. Danielson stated that the most current myelograms and CT scans did not indicate that operative intervention was required. Dr. Danielson stated that it was in the best interests of Claimant to get into a different career and do something light. Dr. Danielson stated that Claimant had reached maximum medical improvement. On December 28, 1995, Dr. Danielson reiterated that Claimant had reached MMI as of December 14, 1995. Dr. Danielson also set forth Claimant's restrictions as needing to avoid rapid head-neck movement, working overhead, prolonged extension of his head and neck, ladder climbing. Dr. Danielson also stated that Claimant should not do repetitive bending, stooping, squatting, or crawling. Claimant was to have a maximum weight lifting limit of 20 to 25 pounds occasionally while using proper body mechanics. Dr. Danielson also stated that Claimant will need to change positions from sitting to standing to ambulating as his tolerance demands. (EX-43, Dep. Ex-8).

On May 6, 1997, Dr. Danielson stated that there was nothing further to offer Claimant from a neurosurgical standpoint. Dr. Danielson assigned Claimant a 12% anatomical impairment rating for the person as a whole as a result of his trauma and subsequent herniated disc, the operative procedure at C6/7, and his herniated disc at L5/S1. Dr. Danielson stated that Claimant is unable to work on ships under construction and is unable to work overhead. Dr. Danielson stated that Claimant cannot work with insulation due to his allergies to it. Dr. Danielson opined that it was in

Claimant's best interest that he no longer work at the shipyard. (EX-43, Dep. Ex-6).

Claimant was referred by Dr. Danielson to Dr. Christopher Y. Lew. Dr. Lew first saw Claimant on August 29, 1996. Dr. Lew reported that Claimant had suffered his initial injury in June of 1987, after which he underwent two ulnar nerve transpositions as well as a two level anterior cervical fusion at C4-5 and C5-6. Dr. Lew stated that Claimant began complaining again in 1992 of persistent pain. In May of 1995, Claimant underwent a second anterior cervical fusion, this time at the C6-7 level. Dr. Lew stated that Claimant returned to work on a light duty basis, but after approximately six months of work, he found that the physical demands of the job were still to strenuous and were making the pain much worse. Dr. Lew noted that Claimant's pain was constant and was aggravated by the movements of the head and neck, as well as by various sleeping positions and activities involving the upper extremities. Dr. Lew stated that Claimant had some radiation of pain into both upper extremities although the left side tended to by worse. Claimant was found to have degenerative changes on imaging studies affecting the lumbosacral, lumbar, and cervical spine. For an assessment, Dr. Lew found post cervical fusion pain syndrome with recurrent disc disease, persistent myofascial pain arising from underlying spine dysfunction. Dr. Lew also found a lumbosacral strain with lumbar degenerative disc disease. Dr. Lew recommended work restrictions, myoneural injections on a weekly basis to facilitate physical therapy, and continued physical therapy and medications. (EX-43, Dep. Ex-2)[1].

[1] "EX-43, Dep. Ex- " stands for "Employer's Exhibits 43, Deposition Exhibits number_." These deposition exhibits follow the deposition of Dr. Danielson.

Dr. Lew again saw Claimant on 2/18/97. At that time, Dr. Lew reported that Claimant's symptoms were stable. Dr. Lew noted that Claimant should be limited in his work activities to light duty. Dr. Lew stated that Claimant should be considered at maximum medical improvement ("MMI") at this time with the provision of ongoing an as needed basis for flare-ups of pain. (EX43, Dep. Ex-3). Claimant saw Dr. Lew on 3/19/97. Ãt this time, Dr. Lew stated that Claimant was stable and at MMI. Dr. Lew stated that in order to preserve his current physical level, it was very important that activity restrictions be adhered to. Dr. Lew felt that Claimant must not do work that will put any strain or pressure on his neck. (EX-43, Dep. Ex-4).

Mr. Joseph R. Walker, vocational rehabilitation counselor, performed rehabilitation consulting services in relation to this matter. On September 30, 1997, Mr. Walker sent a report to Ms. Pam Hale. Mr. Walker found that, in all probability, Claimant could return to modified work activity in the Insulation Department with Employer. Mr. Walker noted that Claimant would not be able to perform the full range of work activity as a joiner/insulation worker. However, Mr. Walker believed that there would be modified task activity in the Insulation Department that would be compatible with Claimant's restrictions. Mr. Walker stated that Claimant could perform the following work activities:

1) Handling boxes or pieces of insulation for storage or movement from the storage area on rubber tired carts;

2) Taking insulation supplies, packages of tape, broken packages of pins or caps to the ship for use and distribution to other insulation workers;

3) Cutting insulation panels to prescribed specifications, lengths, and measurements as called out by another co-worker;

4) Cut insulation panels in a preparatory manner in the Insulation storage area or in the passageways, compartments, or storage areas of the ship;

5) Insulation application consisting of applying insulation to the bulkheads from shoulder level down. This would include performing the work activity from the bottom two or three steps of a stepladder and work shoulder level down, applying the insulation panels to pins that are on the bulkhead wall;

6) Seaming the insulation panels with the adhesive tape;

7) Prep work, consisting of doing layout in the earlier phases of construction, marking the bulkhead wall, using a six by twelve rectangular blade with a handle such as a masonry or dry wall trowel to mark and utilize measurements to identify locations on the bulkheads where insulation pins would be applied;

8) Tape rolling;

9) Taping over the D.C. Boards (information brackets) installed in the compartments and passageways which are taped and the tape trimmed with the backing applied. At a subsequent time, the information holders would be installed at approximately shoulder or chest level in various compartments in passageways on the ships.

(EX-49, pp. 1-13).

Mr. Tommy Sanders also performed vocational rehabilitation services in connection with this case. W. Sanders issued a report dated October 13, 1997 after interviewing Claimant, reviewing his medical records and working history, and completing a labor market survey in the area in proximity to Claimant's home. Mr. Sanders stated that, in consideration of Claimant's age, education, hobbies, work history, and physical restrictions, he believed that Claimant could presently work at a range of unskilled, sedentary to light jobs in his surrounding labor market. Mr. Sanders identified several job openings that he believed were within the capabilities of Claimant. These were:

1) Gulf Coast Security Services: Opening for Security Guard at a pay rate of $5.15 per hour at 40 hours per week. Involved sitting at a guard shack, checking vehicles and people in and out, occasionally walking rounds;

2) Day Security Services: Opening for Security Guard at a pay rate of $5.15 to $5.50 per hour for up to 40 hours per week. Activities involved guarding an assigned commercial customer's property, observing for trespassers and fire hazards, and walking rounds;

3) Dixie Gas: Opening for a cashier at $5.15 per hour for up to 40 hours per week. Duties are cashiering with some light stocking and cleaning on an occasional basis;

4) Days Inn: Opening for a Front Desk Clerk at a wage of $5.50 per hour for 36 hours per week. The opening is for the 11 pm to 7 am shift. Duties involve checking guests in and out of the motel and handling payments from guests.

(EX-53, pp. 1-6).

On November 14, 1997, Mr. Sanders sent two additional jobs to Claimant. These jobs were:

1) Munro Petroleum, Inc.: Opening for Cashier with a pay rate of $5.50 per hour for 39 or more hours per week. A stool is provided for sitting;

2) Coastal Energy, Inc.,: Opening for Fuel Booth Cashier with a pay rate of $5.15 per hour. Weekly hours between 35 and 40. A stool is provided.

(EX-53, p. 12).

DISCUSSION

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, to weigh the evidence, and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiners. Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962): Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 661 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g. It has been consistently held that the Act must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); I.B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967).

However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that

the proponent of a rule or position has the burden of proof. Director OWCP v. Geenwich Collieries 5 12 U. S.267, 114 S. Ct. 2251 (1994), affig 990 F.2d 730 (3rd Cir.. 1993).

Consolidation

Employer in this case has opposed the consolidation of the two claims. I see no reason why the two claims should not be consolidated. Consolidation would avoid needless delay in resolving the issues presented. Further, the one issue remaining from the original claim, a determination of Claimant's post-injury wage earning capacity, is a relatively minor issue. Separate proceedings for the determination of this issue are unnecessary.

Remand Issue: Claimant's Post-Injury Wage Earning Capacity

The first issue for discussion is the determination of whether Claimant's post injury wages fairly and reasonably represented his wage earning capacity following his return to work with Employer after his 1987 accident. This issue is before me per the remand order of the Fifth Circuit dated November 13, 1996. Specifically,, the Fifth Circuit stated that the Administrative Law Judge (ALJ) in the initial Decision and Order made no finding that Claimant's post injury earnings were representative of his wage-earning capacity under Section 908(h) of the Act. To determine post-injury wage earning capacity, Section 8(h) of the Act provides:

> (h) The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this

> section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: Provided, however, that if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earnings capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. Section 908(h).

It is widely accepted that where a claimant seeks benefits for total disability and the employer establishes suitable alternate employment, the earnings established for the alternate employment show the claimant's wage-earning capacity. See Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231, 233 (1984). In the original claim, Claimant sought benefits for total disability and Employer established suitable alternate employment by offering suitable light duty employment in its facility. There was no indication that the employment offered was sheltered employment. Thus, the earrings established for the light duty employment, which were also Claimant's actual wages at that time, were representative of Claimant's wage earning capacity. Under the Act, the party that contends that Claimant's actual wages were not representative of his wage-earning capacity has the burden of establishing an alternative reasonable wage-earning capacity. See Grage v. J.M. Martinac Shipbuilding, v. Director, OWCP 900 F.2d

180,23 BRBS 127 (CRT) (9th Cir. 1990); Misho v. Dillingham Marine & Mfg., 17 BRBS 188, 190 (1985); Spencer v. Baker Agric. Co., 16 BRBS 205, 208 (1984); Burch v. Superior Oil Co., 15 BRBS 423, 427 (1983). Here there is no indication that Claimant attempted to establish an alternative reasonable wage-earning capacity other than to assert that Claimant was totally disabled and had no wage earning capacity. As such, Claimant's wage earning capacity was represented by his post-injury wages. This is the result that should have been presumed by the Fifth Circuit. However, it was not and since an actual determination of the post injury wage earning capacity was ordered, I will comply.

Wage earning capacity refers to "an injured employee's ability to command regular income as the result of his personal labor." Seidel v. General Dynamics Corp., 22 BRBS 403, 405 (1989)(citing 2 A. Larson, The Law of Workmen's Compensation Section 57.51 at 10- 164.64 (1987). Section 8(c)(21) provides that an award for unscheduled permanent partial disability is based on the difference between the claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. If Claimant has a physical impairment but it can be found that Claimant has suffered no loss in his wage-earning capacity, he has suffered no financial loss and therefore is not disabled. 33 U.S.C. Section 908(h); Del Vacchio v. Sun Shipbuilding & Dry Dock Co., 16 BRBS 190, 194 (1984).

Section 8(h) mandates a two-part analysis in order to determine the claimant's post-injury wage-earning capacity. Devillier v. National Steel & Shipbuilding Co., 10 BRBS 649, 660 (1979). The first inquiry requires the judge to determine& whether the claimant's actual post injury wages

reasonably and fairly represent his wage-earning capacity. Randall v. Comfort Control, Inc., 725 F.2d 791,796,16BRBS 56, 64 (CRT) (D.C. Cir 1984). If the actual wages are unrepresentative of the claimant's wage earning capacity, the second inquiry requires that the judge arrive at a dollar amount which fairly and reasonably represents the claimant's wage-earning capacity. Id. at 796-97, 16 BRBS at 64. If the claimant's actual wages are representative of his wage-earning capacity, the second inquiry need not be made. Devillier 10 BRBS at 660.

For both parts of the wage-earning capacity analysis, the judge must take a number of factors into consideration. The judge must consider the claimant's physical condition, age, education, industrial history, availability of employment, claimants earning power on the open market, continuity and stability of claimant's post-injury work, and whether medical and other circumstances indicate a probable future wage loss due to the work-related injury. Devillier 10 BRBS at 651, Warren v. National Steel & Shipbuilding Co., 21 BRBS 149,153 (1988).

Accordingly, I must first determine whether claimant's actual post injury wages reasonably and fairly represent his wage-earning capacity. Claimant returned to work with Employer in a modified joiner position on October 29, 1990. At that time, Claimant was still of young age and his education was adequate for employment as a joiner. At the original hearing of October 2, 1991, Claimant stated that he was currently working the same number of hours as he had before he was injured. Claimant also stated that he was earning more money ($12.28 per hour) than he had been before his injury ($10.28 per hour). Claimant also acknowledged that he had good attendance and had not received any disci-

plinary notices for poor work since returning to work on October 29, 1990. (EX-27, p. 11). As such, Claimant's work was stable and there was no indication, at that time, that Claimant would have a future wage loss due to his original work related injury. Further, Dr. Danielson testified at his original deposition that the fact that Claimant had performed his fight duty work for almost a year and continuing was a good indication of his ability to be able to perform that work into the future. Accordingly, Claimant's actual post injury wages both reasonably and fairly represented his wage-earning capacity.

Causation

We now turn to the second claim filed in this case. This claim has arisen due to an accident occurring on May 8, 1992. Initially, the claimant has the burden of establishing a prima facie case of compensability, namely to demonstrate a physical and/or mental harm was sustained and prove that working conditions existed or an accident occurred which could have caused the harm. Graham v. Newport News Shipbuilding & Dry Dock Co., 13 BRBS 336, 338 (1981); U.S. Industries/Federal Sheet Metal Inc. v. Director, OWCP, United States Department of Labor, 455 U.S.608, 616, 102 S.Ct. 1312, 1318 (1982). Once Claimant establishes these two elements of a prima facie case, Section 20(a) of the Act favors Claimant with a presumption that links the harm suffered with Claimant's employment. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981); Hampton v. Bethlehem Steel Corp. 24 BRBS 141, 143 (1990); Noble Drilling Co. v. Drake, 795 F.2d 478, 481 (5th Cir. 1986). Moreover, Section 20(d) of the Act favors Claimant with a presumption that the injury suffered was not occasioned by the willful intention of the injured employee to injure or kill

himself or another. Green v. Atlantic & Gulf Stevedores-Incorporated, 18 BRBS 116 (1986).

The mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer. U.S. Indus./Fed. Sheet Metal v. Director OWCP, 455 U.S. 608 (1982), rev'g Riley v. U.S. Indus./Fed. Sheet Metal 627 F.2d 455 (D.C. Cir. 1980). The claimant's theory as to how the injury occurred must go beyond "mere fancy." Champion v. S&M Traylor Bros., 690 F.2d 285, 295 (D:C. Cir. 1982).

A claimant's uncontradicted, credible testimony alone may constitute sufficient proof of physical injury and form the basis of an award of compensation. Golden v. Eller & Co. 8 BRBS 846, 849 (1978), aff'd 620 F.2d 71, 74 (5th Cir. 1980); Avondale Shipyards. Inc. v. Kennell, 914 F.2d 88, 91 (5th Cir. 1990).

After the presumption has been established, the employer must introduce "substantial evidence" to rebut the presumption of compensability and show that the claim is not one "arising out of or in the course of employment." 33 U.S.C. Sections 902(2), 903. Only after the employer offers substantial evidence does the presumption fall "out of the case." Del Vecchio v. Bowers, 296 U.S. 280, 186, 56 S.Ct. 190, 193 (1935). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Sprague v. Director OWCP, United States Department of Labor, 688 F.2d 862, 865 (1st Cir. 1982). Such evidence must be specific and comprehensive enough to sever the potential question between the liability and the work environment. Parsons Corp. v. Director, OWCP United States Department of Labor, 619 F.2d 3 8, 41 (9th Cir. 1980).

If the Employer succeeds in its burden, the issue of causation must be resolved based upon the evidence as a whole. Kier v. Bethlehem Steel Corp., 16 BRBS 128, 129 (1984); Devine v. Atlantic Container Lines, G.I.E., et al, 25 BRBS 15, 21 (1991). When the evidence as a whole is considered, it is the proponent (Claimant) who has the burden of proof See Greenwhich Collieries, 512 U.S. 267.

Here, there is no question of a work related accident and injury which occurred on May 8, 1992. While it is clear that Claimant had an underlying condition in his neck and elbow, under the Act, a work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. Preziosi v. Controlled Indus., 22 BRBS 468 (1989); Januszewicz v. Sun Shipbuilding & Dry Dock Co., 22 BRBS 376 (1989) (Decision and Order on Remand). Clearly, Claimant aggravated his neck condition on May 8, 1992.

Accordingly, Claimant has proved his prima facie case. Employer has not attempted to introduce "substantial evidence" to rebut the presumption of compensability and show that the claim is not one "arising out of or in the course of employment." Accordingly, causation has been proved by Claimant

Nature and Extent of Disability

"Disability" under the LHWCA means incapacity as a result of the injury in question to earn wages which the employee was receiving at the time of the injury at the same or any other employment. 33 U.S.C.§902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psycho-

logical impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991).

Regarding the nature and extent of disability, in the initial stage, the claimant need not establish that he could not return to any employment, only that he could not return to his former and "usual" employment. Elliot v. C&P Tel. Co., 16 BRBS 89 (1984). The same standard applies regardless of whether the claim is for temporary total or permanent total disability. If the claimant meets this burden, he is presumed to be totally disabled. Walker v. Sun Shipbuilding & Dry Dock Co. (Walker II) 19 BRBS 171 (1986). Here, Claimant must establish that he could not return to his usual employment and that his inability to return to his employment is at least partially connected to his injuries sustained on August 2, 1996.

I find that Claimant has established his prima facie case of total disability. No doctor in this case has suggested that Claimant was able to resume his "usual"' unmodified employment after August 2, 1996, nor has Employer argued that he could. The evidence shows that Claimant's previous neck condition was aggravated by his injury on May 8, 1992, and as such, the injury was a contributing factor in Claimant's inability to return to his employment. Accordingly, Claimant has established his prima facie case of total disability.

Once a claimant establishes a prima facie case of total disability, the burden shifts to the employer to establish suitable alternate employment. An employer must show the existence of realistically available job opportunities within the geographic area where the employee resides which he is capable of performing, considering his age, education, work

experience and physical restrictions, and which he could secure if he diligently tries. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981), rev'g 5 BRBS 418 (1977); Diamond M Drilling Co. v. Marshall, 577 F.2d 1003, 8 BRBS 658 (5th Cir. 1978) aff'g Kilsby v. Diamond M Drilling Co., 6 BRBS 114 (1977).

An employer can meet its burden of showing suitable alternate employment by offering the claimant a job in its facility, Spencer v. Baker Agricultural Co., 16 BRBS 205 (1984), including a light duty job, so long as it does not constitute sheltered employment. Darden v. Newport News Shipbuilding & Dry Dock Co. 18 BRBS 224 (1986); Harrod v. Newport News Shipbuilding & Dry Dock Co., 12 BRBS 10, 12-13 (1980). Here, Employer returned Claimant to work following his May 8, 1992 injury. Claimant returned to work in October of 1992 and was employed installing bunks on a ship. (Tr. p. 70). Claimant stated that the work of installing bunks included the drilling the pop rivets, which aggravated his arm. Claimant stated that even though this aggravated his previous injury, he stayed with it and as a result, never had a problem with supervisors or never got in trouble for missing work. Claimant was under the impression that he would have pain for the rest of his life and needed to find ways to cope with it. (Tr. p. 70). Claimant had surgery on his neck early in 1995 due to extreme pain and stiffness. Claimant then returned to work as in a modified joiner position in January of 1996. In Claimant's return, he first was employed doing layout work, then as a tape roller. Claimant worked as a tape roller for approximately seven months when he was forced to quit due to increased pain from the repetitious nature of the task.

Normally, under the Act, suitable alternate employment would be established where a claimant returned to work in the employer's facility. However, in this case, we have a situation where it is not clear that the work offered was "suitable" as Claimant alleges it caused him aggravation of his injuries. Thus, our question now is whether the light duty employment offered to Claimant was too physically demanding for Claimant to perform.

Under the Act, an employer's job offer which is too physically demanding for a claimant to perform is not suitable alternate employment. Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980); Perini Corp. v. Heyde, 306 F. Supp. 1321, 1328 (D.R.I. 1969); Mason v. Bender Welding & Mach Co.," 16 BRBS 307, 309 (1984). Here, Claimant was able to work for a period of time in a modified joiner capacity but eventually was forced to leave work and undergo additional surgical procedures on his neck. Later, in 1996, Claimant was able to perform the tape rolling job for approximately seven months. After seven months, Claimant complained of increasing pain due to the repetitious nature of the task. Claimant was sent to Employer's infirmary and from there was sent to Dr. Danielson who again pulled Claimant from work. (Tr. p. 76). Dr. Danielson later opined that Claimant could not work as a tape roller because of the strain to his neck and arms. (EX-43, p. 45).

It is clear that Claimant had substantial difficulty in performing the duties of the modified joiner position. His job activities aggravated his condition to such an extent that further surgery was required on his neck. This being so, it is apparent that the modified employment undertaken by Claimant after 1992 was too physically demanding for

Claimant to handle. The same may be said for the tape rolling job which ultimately aggravated Claimant's condition. As such, I think that there is no question that the tape rolling job was not suitable for Claimant either. Accordingly, Employer's proffering of the modified joiner position and the tape roller position do not constitute suitable alternate employment. I note that there are no medical opinions submitted that state a contrary finding.

Employer asserts that their further offering of a modified joiner position on August 5, 1997, which paid the regular wage of a first class joiner constituted suitable alternate employment. Again, the following job activities were submitted by Employer as a modified joiner position which would constitute suitable alternate employment:

1) Handling boxes or pieces of insulation for storage or movement from the storage area on rubber tired carts;

2) Taking insulation supplies, packages of tape, broken packages of pins or caps to the ship for use and distribution to other insulation workers;

3) Cutting insulation panels to prescribed specifications, lengths, and measurements as called out by another coworker;

4) Cutting insulation panels in a preparatory manner in the insulation storage area or in the passageways, compartments, or storage areas of the ship;

5) Insulation application consisting of applying insulation to the bulkheads from shoulder level down. This would include performing the work activity from the bottom two or

three steps of a stepladder and work shoulder level down, applying the insulation panels to pins that are on the bulkhead wall;

6) Seaming the insulation panels with the adhesive tape;

7) Prep work, consisting of doing layout in the earlier phases of construction, marking the bulkhead wall, using a six by twelve rectangular blade with a handle such as a masonry or dry wall trowel to mark and utilize measurements to identify locations on the bulkheads where insulation pins would be applied;

8) Tape rolling;

9) Taping over the D.C. Boards (information brackets) installed in the compartments and passageways which are taped and the tape trimmed with the backing applied. At a subsequent time, the information holders would be installed at approximately shoulder or chest level in various compartments in passageways on the ships.
(EX49, pp. 1-13).

The job offered was full time and within Claimant's same department. The job was suitable according to Mr. Joe Walker, who is an independent certified rehabilitation counselor. According to Employer, Claimant would have been allowed a wide latitude to refuse work that was outside of his limitations. Claimant was invited to an interview in which the specific requirements of the job(s) would have been discussed. However, Claimant refused to come to the interview. Claimant later stated that he refused to do further work for Employer under any circumstances.

I find that the modified joiner position offered by Employer is not acceptable as suitable alternative employment. Regarding the medical opinions in the record, there is only one opinion that is of note, that being the opinion of Dr. Danielson. No other medical opinions on the subject of whether or not Claimant could work in the shipyard have been offered. Dr. Lew, while not addressing this issue, did state that Claimant must not do work that will put any strain or pressure on his neck. (EX-43, Dep. Ex-4).

In regard to the tape roller position, which was one of the activities slated for Claimant's modified joiner position, Dr. Danielson felt that Claimant could not work as a tape roller because of the strain to his neck and arms. Dr. Danielson did state that as long as Claimant's work fits within his limitations, whether it be in a supervisory capacity or not, he would release him to do that work. (EX-43, p. 45). However, in general, Dr. Danielson opined that it was not in Claimant's best interests to remain at the shipyard. Dr. Danielson noted that Claimant would be most at risk in situations where he would have to turn or twist rapidly. (EX-43, pp. 18-20). Dr. Danielson also repeatedly emphasized that Claimant should avoid repetitive motion overhead and that such repetitive motions would be involved in any overhead work and ladder climbing. (EX-43, pp. 40-52).

Dr. Danielson, in his deposition, again stated that it was in the best interests of Claimant to get into a different career and do something light. (EX-43, Dep. Ex-8). At that time, Dr. Danielson opined that Claimant was vulnerable to repeat injury and should be employed in a light-duty supervisory capacity. Dr. Danielson opined that shipwork was not suitable for Claimant because the working conditions were such that a person was always subject to bumping his head and

overhead working was not in Claimant's best interests. (EX-43, p. 9).

Accordingly, it is overwhelmingly clear that Dr. Danielson is not in favor of Claimant returning to work in the shipyard in any capacity, with the possible exception of a supervisor position. No other medical opinion on this issue is in evidence, thus, the weight of medical evidence in this case does not support a finding of suitable alternate employment based on the offering of a modified joiner position.

Further, Claimant has testified that overall, there is no job in the shipyard that he can do on a eight-hour a day, 40 hour per week basis, because there are days when he cannot work as his hands are in significant pain and his neck is restrictively stiff. (Tr. p. 123). 1 have found no reason to question the credibility of Claimant's testimony, thus I will credit it in full and afford it substantial weight.

In reviewing the task descriptions submitted by Employer, it is also fairly reasonable to conclude that the tape rolling task was one of, if not the least strenuous of all of the tasks listed. It would seem that if the tape rolling task exceeded his restrictions and aggravated Claimant's condition, the more strenuous tasks that were listed would do the same or worse. Also, Claimant, should he work in the modified joiner position, would be put back to work in the shipyard and would, in many instances, be working with a regular crew. In such a situation, the chances of Claimant exceeding his restrictions on occasion would be great. Such was the case when Claimant previously worked for Employer and I see no reason why such instances would not occur again. These instances would put Claimant at an increased peril for re-injury or aggravation.

Accordingly, based on the medical opinion in this case, the testimony of Claimant, and my own observations, I find that the offering of a modified joiner position does not constitute suitable alternate employment.

Employer next argues that Claimant has suffered no loss of wage earning capacity as he has worked on a job constructing a tower and earned an average of approximately $2,000.00 per week, which would far exceed the average weekly wage earned with Employer. As stated previously, if Claimant has a physical impairment but it can be found that Claimant has suffered no loss in his wage-earnings capacity, he has suffered no financial loss and therefore is not disabled. 33 U.S.C. Section 908(h). Here however, it is clear that the temporary job Claimant undertook was a one time job on a limited basis (eight days). Thus, I find that Claimant's work on the tower construction and his pay earned from his labor was in no way representative of his wage earning capacity on the open market.

Next Employer asserts that Claimant has suffered no loss of wage earning capacity as he is presently making more now running his own business than he did when he was working for Employer. While Claimant presently pays himself approximately $250.00 per week, Employer argues that this figure should be much higher as it does not incorporate the amounts voluntarily reinvested back into the company. Employer states that Claimant's company has profited over $3,395.25 in the 13 weeks it has been running. Employer asserts that had Claimant pocketed all of the profits instead of reinvesting a substantial portion of them, his average weekly wage would be approximately $511.17, which would be higher than the stipulated weekly wage of $412.51.

First, Claimant has not been pocketing all of his profits, but instead has only been taking approximately $250.00 per week. Thus, regardless of what Claimant could do with the profits, he is still only pocketing $250.00 per week. Also, with the failure rate of first-time small business, it is quite likely that Claimant's business will require re-investment in order to stay financially secure. Thus, Claimant will likely be re-investing additional funds in the future. Secondly, even if Claimant did not re-invest all of the profits, the profit money will likely be diverted elsewhere. Claimant will soon have additional expenditures in the form of liability insurance, medical coverage, additional taxes, and the hiring of an accountant. (Tr. pp. 110-111). Third, Claimant also makes his money dependent on how many jobs are available to him. Thus, Claimant is dependent on the market for mobile homes and the number of houses sold by Grand Housing. Should that market stall, Claimant would not make any money. Accordingly, I find that the profits made by Claimant's fledgling company are not indicative of Claimant's wage earning capacity. Instead, I find that the his actual average earnings of $250.00 per week are much more reasonable. Thus, I find that Claimant's present wages of $250.00 fairly and reasonably represent his wage earning capacity.

Employer has also submitted evidence of other suitable alternate employment. Clearly, the positions of cashier at Dixie Gas, Munro Petroleum, Inc., and Coastal Energy, Inc., fall within the restrictions of Claimant. Again, the restrictions set out by Dr. Danielson were as follows: no rapid head-neck movement, working overhead, prolonged extension of his head and neck, ladder climbing, repetitive bending, stooping, squatting, or crawling. Claimant was to have a maximum weight lifting limit of 20 to 25 pounds occa-

sionally while using proper body mechanics. Dr. Danielson also stated that Claimant will need to change positions from sitting to standing to ambulating as his tolerance demands. (EX-43, Dep. Ex-8). At the cashier position, Claimant will have a stool and will be able to change positions from sitting to standing. Claimant will not be in a situation where he win have to repetitively bend, stoop, squat, or crawl. Accordingly, I find that the cashier positions identified by Employer would constitute suitable alternate employment. However, as none of the positions pay more than $5.50 per hour, Claimant's present job, which pays him $250.00 per week, shall be used in determining his loss of wage earning capacity.

The evidence indicates that Claimant began his self-employment on August 31, 1997. Accordingly, as of August 31, 1997, Claimant's disability becomes partial in nature. Employer will not be liable for compensation benefits for the eight days Claimant spent working on the tower construction. As the parties have stipulated that Claimant has reached maximum medical improvement on December 14, 1995, Claimant's disability is also permanent. Previous to the date of August 31, 1997, Claimant is entitled to total disability for the dates on which he was not working due to his work related injuries. The parties have stipulated to an average weekly wage of $412.51. Past the date of August 31, 1997, Claimant is entitled to permanent partial benefits based upon a loss of wage earning capacity of $162.51 ($412.51 - $250.00 (Claimant's present wage earning capacity)).

Section 8(f) Relief

Employer has requested Section 8(f) relief. Section 8(f)

shifts part of the liability for permanent disability from the employer to the Special Fund established by Section 44, when the disability is not due solely to the injury which is the subject of the claim.

Section 8(f) relief is available if three requirements are met: (1) that the claimant had a pre-existing permanent disability, (2) that this partial disability was manifest to the employer-, and (3) that it rendered the second injury more serious than it otherwise would have been. Director, OWCP v. Berkstresser, 921 F.2d 306, 309, 24 BRBS 69 (CRT) (D.C. Cir. 1990), rev'g 16 BRBS 231 (1984), 22 BRBS 280 (1989). In cases of permanent total or permanent partial disability there are an additional three requirements: (1) a new injury; (2) the disability must not be due solely to the new injury; (3) the disability must be materially and substantially greater than that which would have resulted from the new injury alone. Jacksonville Shipyards v. Director, QWCP 851 F.2d 1314, 1316-17 (11th Cir. 1988), Director v. Newport News Shipbuilding & Dock Co., 8 F.3d 175 (4th Cir. 1993).

In assessing Employer's entitlement to Section 8(f) relief, it must first be established that Claimant had a pre-existing disability. Clearly, Claimant suffered an injury to his neck and elbow in 1987 while in the employ of Employer. Afterward the recovery process, Claimant was once again employed by Employer. Accordingly, Employer has shown that Claimant had a pre-existing disability to his neck and elbow.

The next question is whether this disability was manifest to Employer. Clearly, Employer was aware of Claimant's accident and resulting injury on September 24, 1987. Employer was also aware of the resulting disability and

work limitations based on that disability.

The next issue is whether the initial disability/injury rendered the second injury more serious than it otherwise would have been. Here, the initial injury to Claimant's neck undoubtedly made Claimant's second neck injury worse. Dr. Danielson stated that it was his medical opinion that Claimant's neck pain was an aggravation of a pre-existing problem. (EX-43, Dep. Ex-8). Dr. Danielson later specifically testified that Claimant's pre-existing 1987 injury combined with and contributed to the effects of the injury of May 8, 1992 to make the Claimant materially and substantially more disabled than he would have been as a result of the injury of May 8, 1992 alone. From my viewpoint, it is clear that Claimant's prior injury and operation on his neck made the second injury more severe, especially in light of the fact that Claimant's second injury was not traumatic and the injury was caused only by a quick twisting of the neck. Accordingly, I think there is no question that Claimant's pre-existing injury due to his accident in September of 1987, had combined with Claimant's second injury in 1992, to make Claimant's injury more serious than it otherwise would have been.

To restate, in cases of permanent total or permanent partial disability there are an additional three requirements: (1) a new injury; (2) the disability must not be due solely to the new injury; (3) the disability must be materially and substantially greater than that which would have resulted from the new injury alone.

Clearly, there was a new injury on May 8, 1992. It is also clear that the present disabilities are due to both the new injury and the past injuries. Finally, it is readily apparent that

Claimant's underlying neck condition made the resulting disability materially and substantially greater than that which would have resulted from the new injury alone. I base this on Dr. Danielson's opinion and the fact that Claimant's second injury was a simple twist that was not traumatic. Thus, it is clear that Claimant's underlying condition had to have combined with his injury to make his present disability significantly worse. Accordingly, Employer is entitled to Section 8(f) relief.

Under Section 8(f)(1), if the employment injury is a non-scheduled injury which results in permanent partial or permanent total disability, the employer's liability is limited to 104 weeks of compensation; thereafter, the Special Fund makes the compensation payments. Therefore, Employer's and Carrier's 104 weeks of liability begins when Claimant has permanency status regarding his disability. Disability, either partial or total, will be considered permanent -if, and when, the claimant's condition reaches the point of maximum medical improvement. James v. Pate Stevedoring Co., 22 BRBS 271, 274 (1989). Thus, Employer's liability for permanent partial disability payments will end 104 weeks past the date of maximum medical improvement. Thereafter, the Special Fund would assume the payment of benefits. Here, the date of maximum medical improvement is December 14, 1995, as assigned by Dr. Danielson and stipulated to by the parties.

Sanctions

Claimant has also requested sanctions for alleged discovery abuses committed by Employer. Specifically, Claimant suggests that Employer ignored discovery requests through evasive and incomplete answers and that Employer

failed to respond to the requests within ten days of the due date. Claimant submitted Interrogatories and Request for Production of Documents to Employer which were received on September 10, 1997. Employer submitted answers to the discovery requests on October 20, 1997. I find that the any delay in the submission of discovery responses was not prejudicial to Claimant. Claimant further alleges that the answers given by Employer in it responses to discovery requests were evasive. In reviewing Employer's responses, I did not find anything so unusual or egregious as to warrant sanctions.

Interest and Attorneys Fees

Claimant is entitled to interest on any accrued unpaid compensation benefits. Watkins v. Newport News Shipbuilding & Dry Dock Company 8 BRBS 556, 559 (1978), aff'd in part, rev'd in part sub nom., Newport News Shipbuilding & Dry Dock Company v. Director, OWCP, 594 F.2d 986 (4th Cor. 1979). Interest is mandatory and cannot be waived in contested cases. Byrum v. Newport News Shipbuilding and Dry Dock Co., 14 BRBS 833 (1982); Mac Donald Building & Dry Dock, Co., 10 BRBS 734 (1978).

Section 28 of the Act and implementing Code of Federal Regulations Section 702.132 provide for approval of attorney fees. Claimant's counsel, Blewett Thomas, is hereby directed to file attorney fee petitions within 30 days of receipt of this Decision and Order while at the time serving copies on Employer's counsel who shall then have 30 days from receipt in which to respond to the fee applications.

ORDER

It is therefore ORDERED that:

(1) Employer shall pay Claimant compensation for temporary total disability from May 9, 1992 to December 14, 1995, the date of maximum medical improvement, but will exclude those days in which Claimant was working, based on an average weekly wage of $412.51, and in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. §908(b);

(2) Employer shall pay Claimant compensation for permanent total disability from December 14, 1995 to August 31,1997, the date suitable alternative employment was undertaken by Claimant, but will exclude those days in which Claimant was working, based on an average weekly wage o f $412.51, and in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. §908(a);

(3) Employer shall pay Claimant compensation for permanent partial disability from August 3 1, 1997, and continuing, based upon a loss in wage earning capacity of $162.51, and in accordance with Section 8(c) of the Act. 33 U.S.C. §908(c).

(4) Employer's request that they be afforded Section 8(f) relief commencing December 14, 1997 is hereby GRANTED. Section 8(f) relief is granted to Employer to relieve Employer of any liability for disability benefi's 104 weeks after the December 14, 1995 maximum medical improvement date;

(5) Employer is entitled to credits for any compensation

paid to Claimant for the above noted periods;

(6) Employer shall pay for or reimburse Claimant for all necessary and reasonable medical care and treatment related to his May 8, 1992 work-related injury and aggravations;

(7) Employer shall pay Claimant interest on any accrued unpaid compensation benefits. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average auction price for the last auction of 52 week United States Treasury bills as of the date this Decision and Order is filed with the District Director;

(8) Claimant's counsel, Blewett Thomas, shall have 30 days from receipt of this Order in which to file an attorney fee petition and simultaneously serve a copy of the petition on opposing counsel. Thereafter, Respondents shall have 30 days from receipt of the fee petition in which to respond to the petition.

So ORDERED this the 15th of April, 1998 at Metairie, Louisiana.

/s/ Richard D. Mills

RICHARD D. MILLS
Administrative Law Judge

APPENDIX G

U.S. Department of Labor
Office of Administrative Law Judges
Heritage Plaza, Suite 530
111 Veterans Memorial Blvd.
Metairie, LA 70005
(504) 589-6201

In the Matter of	)	
	)	
RENE DARBY,	)	Case Nos. 91-LHC49
Claimant	)	97-LHC-1556
against	)	
	)	OWCP Nos. 06-110624
INGALLS SHIPBUILDING,	)	06-145508
INC.,	)	
Self-Insured Employer	)	

ORDER DENYING CLAIMANT'S MOTION FOR RECONSIDERATION

Claimant on May 11, 1998, filed a Motion for Clarification of my April 15, 1998 Decision and Order Awarding Compensation Benefits, or alternatively, for Reconsideration of the claims made by Claimant.

Claimant first requests clarification of whether the two claims in this case were fully and formally consolidation. First, as stated on page 15 of the Decision and Order,

the two claims were consolidated for purposes of the hearing. Separate proceedings for the determination of the remand issue were found to be unwarranted. Thus, for purposes of the hearing, the claim were consolidated. Both claim numbers shall continue to be used. The two claims, however, will not be termed as a single cause of action. The two claim represented two separate and distinct injuries, although the second claim arose out of an aggravation of the original injury.

Second, the only issue on remand from the Board was that of whether Claimant's post injury wages fairly and reasonably represented his wage earning capacity following his return to work with Employer after his 1987 accident. The Decision and Order of April 15, 1998 effectively addressed this Remand issue. As such all issues arising out of the first claim have been properly adjudicated. If Claimant wishes to appeal, his appeal will be limited to that Remand issue only. Claimant has filed a Motion for Reconsideration, dependent on whether the two aforementioned claims were consolidated in a single cause of action. Since they are obviously not a single cause of action, I will now address Claimant Motion for Reconsideration.

Claimant first asserts that, regarding his 1987 injury, he is entitled to a *de minimus* award based on the Supreme Court's in Rambo II. I disagree. The decision in Rambo II solidified the Fifth Circuit's established position of allowing *de minimus* or nominal awards in certain situations where the claimant has a proven work-related medical disability which has not diminished his present wage earning capacity. *See generally*, Hole v. Miami Shipyards, Corp., 640 F.2d 769, 772, 13 BRBS 237 (5th Cir. 1981). The Court will allow these type of awards where there is "significant

potential that the injury will cause diminished capacity under future conditions." Rambo II, __U.S.__. 117 S.Ct. at 1963. This holds open the possibility for modification of an award under 33 U.S.C. § 922 if future events or circumstances change a potential disability into an actual one. Id.

While Claimant appears to fulfill the requirements necessary for a *de minimus* award, upon closer examination it is clear that the danger for which the de minimus award was designed to guard against are not present in this case. Claimant, in his second claim, sustained an aggravation to his original injury for which he was granted permanent partial benefits. While under the Act, this aggravation was a "new injury," it clearly arose out of the original 1987 injury. Thus, any present loss in wage earning capacity is a product of the combination of the 1987 injury and the 1992 aggravation. As such, the loss in wage earning capacity is duly represented by the award of permanent partial disability benefits which takes into consideration Claimant's physical capabilities as they existed at the time of the award. In other words, the original injuries suffered in 1987 are accounted for in the award of permanent partial disability benefits.

The intent behind Rambo-II is to ensure that Claimant's are not left without recourse when they have no present loss of wage earning Capacity but will likely have a future loss of wage earning capacity. Such claimants, since they have no present loss of wage earning capacity and no right to an award of disability, lose the right to a Section 22 modification after one year. The *de minimus* award however, allows the window of opportunity in which to file for a Section 22 modification to stay open indefinitely. Thus, in regards to whom the de minimus award is designed to pro-

tect, we see that the *de minimus* award is granted only to those claimant's who have no present loss of wage earning capacity. In this case, Claimant certainly has a present loss of wage earning capacity, due to both his 1987 injury and his 1992 aggravation. As such, he cannot be awarded a *de minimus* award. To note, Claimant's permanent partial disability benefits leave open the possibility of modification under Section 22 at a later date.

Claimant next asserts that a *de minimus* award is proper as the 1987 injury may have contributed to the onset of carpal tunnel syndrome in Claimant's hands. To clarify, the *de minimus* award is designed to protect a claimant's rights for a Section 22 modification for a probable future loss of wage earning capacity. However, the loss in wage earning capacity must relate back to the injury which was the source of the claim. Claimant' s claim of carpal tunnel syndrome has not been substantiated, evidenced, or adjudicated in the previous claims. As such a Section 22 modification could not even address it.

Claimant next asserts that he is entitled to a Section 22 modification. Apparently, Claimant requests a Section 22 Modification based on the assertion that he suffered a loss of wage-earning capacity while he was receiving temporary total disability in that he was only receiving 2/3rds of his average weekly wage as temporary total compensation. Hence, Claimant asserts that he has suffered a 1/3rd loss in his wage-earning capacity during the 1992 and 1995 temporary total disability periods.

From the outset, I note that there is absolutely no

basis, legal or otherwise, for Claimant's assertion. I would direct Claimant's attention to Section 8(b) of the Act which states:

> (b) Temporary total disability: In case of disability total in character but temporary in quality 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance there-of

33 U.S.C. §908(b).

Simply put, an injured worker who receives benefits under the Act for total disability receives 2/3rds of his wages during the period of total disability. There are no deviations from the statute and the judge has no discretion in this matter. A claimant has no right to recover the remaining one third.

Upon consideration of Claimant's Motion for Reconsideration, any opposition thereto, and the record herein, Claimant's Motion for Reconsideration is hereby DENIED.

So ORDERED this the 25th day of JUNE, 1998 at Metairie, Louisiana.

/S/ Richard Mills

RICHARD D. MILLS
Administrative Law Judge

APPENDIX H

U.S. Department of Labor Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 92-1547

RENE M. DARBY

Claimant-Petitioner

V.

INGALLS SHIPBUILDING, INCORPORATED DATE ISSUED: Aug 20 99

Self-Insured
Employer-Respondent

ORDER

Claimant has filed a timely motion for reconsideration of the Board's May 24, 1999 Order denying an attorney's fee to claimant's counsel for work performed before the Board. 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407(a). Employer responds, urging denial of claimant's motion. We deny the motion for reconsideration for the reasons that follow, and we therefore affirm the denial of an attorney's fee.

Claimant sustained left elbow and cervical spine injuries in September 1987 for which employer paid temporary total disability benefits. In his initial decision, the administrative law judge found claimant's thoracic spinal condition unrelated to the work injury, that employer provided suitable alternate employment in its facility, that

claimant has no loss in wage-earning capacity, that claimant is entitled to an award under the schedule for a 15 percent impairment to his left arm, that claimant's average weekly wage is higher than that paid by employer, and that employer is not liable for the treatment provided by Dr. Danielson. Claimant appealed this decision to the Board, raising issues relating to suitable alternate employment and wage-earning capacity. The Board affirmed the admini strative law judge's decision in all respects. *Darby v. Ingalls Shipbuilding, Inc.*, BRB No. 92-1547 (Feb. 24, 1995).

Claimant appealed the Board's decision to the United States Court of Appeals for the Fifth Circuit. The court affirmed the finding that employer established suitable alternate employment by virtue of a light duty job in its facility, but remanded for additional findings concerning claimant's post-injury wage-earning capacity. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT) (5th Cir. 1996).

On remand, the administrative law judge consolidated the pending claim with a claim for a new injury that occurred in 1992 while claimant was working in the light duty position. The administrative law judge found that claimant had no loss in wage-earning capacity from the 1987 injury. With regard to the new injury, the administrative law judge, found that claimant is unable to return to the modified job, and that claimant was totally disabled from May 1992 until claimant became self-employed as of August 31, 1997. Thereafter, the administrative law judge found claimant entitled to permanent partial disability benefits. 33 U.S.C. §908(c)(21). Claimant filed a motion for reconsideration. The administrative law judge rejected claimant's contention that he is entitled to a nominal award for the 1987 injury.

The administrative law judge further stated that the 1992 "aggravation" is a new injury under the Act but that it arose out of the 1987 injury; "[t]hus, any present loss in wage earning capacity is a, product of the combination of the 1987 injury and the 1992 aggravation." Order on Recon. at 2. Claimant did not appeal these decisions.[1]

Claimant's counsel sought an attorney's fee of $14,984, plus expenses, for work performed before the Board in his initial appeal, to which employer objected. The Board denied the fee in its entirety, stating that claimant was unsuccessful on appeal.

In his motion for reconsideration, claimant contends that in denying a fee, the Board ignored the fact that the administrative law judge stated on reconsideration that claimant's present disability is due to both the 1987 injury and the 1992 aggravation thereof. Thus, claimant contends he was successful because, in effect he obtained concurrent awards for the two injuries; he alleges that the two injuries are interrelated such that he is entitled to the attorney's fee requested, citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

We reject claimant's contentions. Initially, we note that the Board and the Fifth Circuit affirmed the administrative law judge's finding that employer established suitable alternate employment at its facility. Moreover, on remand from the court the administrative law judge found that claimant has no loss in wage-earning capacity due to the

[1] The administrative law judge subsequently awarded claimant's counsel an attorney's fee of $21,800, plus expenses, after reducing the fee requested by 25 percent to reflect what he termed claimant's limited success. Claimant has appealed this fee award. BRB No. 99-0618.

1987 injury, and is not entitled to a nominal award for this injury. These findings were not appealed. The fact that the administrative law judge stated on reconsideration that the present loss in wage-earning capacity is due to both the 1987 and 1992 injuries does not make claimant successful for the period of time prior to the second injury, which is the only period of time in question for the attorney services performed before the Board. Prior to the second injury, the administrative law judge found that claimant was able to work at the modified job with no loss in wage-earning capacity. it is only since the 1992 "aggravation" (which is a "new" injury under the Act) that claimant is unable to work at the light duty job. Thus, that the two injuries may be anatomically related, based on the medical evidence of record, does not mean that claimant's economic disability, which is being compensated, is due to both injuries.

The cases cited by claimant for the proposition that an -inchoate right will entitle counsel to an attorney's fee are inapposite. These cases present the situation where the claimant would be entitled to benefits if not for the employer's credit of some kind. See, e.g., *E.P. Paup Co.* v. Director, OWCP, 999 F.2d 1341,27 BRBS 41(CRT) (9th Cir. 1993); Kinnes v. General Dynamics Corp., 25 BRBS 311 (1992). In this case, there is no entitlement to benefits, inchoate or otherwise, for the 1987 injury, and counsel therefore was unsuccessful on appeal to the Board. Furthermore, although *Hensley* permits a fee for interrelated claims, the claims here clearly are severable as the work performed before the Board represents time expended prior to the 1992 injury. See generally *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 26 BRBS 161(CRT) (D.C. Cir. 1991). inasmuch as claimant was unsuccessful in obtaining benefits for the 1987 injury by virtue of his appeals to the Board and the

Fifth Circuit, we affirm the Board's denial of an attorney's fee for work performed in BRB No. 92-1547.[2]

Accordingly, claimant's motion for reconsideration is denied. The Board's May 24, 1999 Order is affirmed.

SO ORDERED.

/S/ Betty Jean Hall

BE TTY JEAN HALL, Chief
Administrative Appeals Judge

/S/ James F. Brown

JAMES F. BROWN
Administrative Appeals Judge

/S/ Regina C. McGranery

REGINA C. McGRANERY
Administrative Appeals Judge

[2] We note that the Fifth Circuit summarily denied claimant's request for an attorney's fee for work performed before the court, as well as claimant's motion for reconsideration thereof.

APPENDIX I

BEFORE THE UNITED STATES DEPARTMENT OF LABOR OFFICE OF WORKERS' COMPENSATION PROGRAMS
OWCP NO. 6-110624

RENE M. DARBY — CLAIMANT

VERSUS

INGALLS SHIPBUILDING, INC. — EMPLOYER
(A Self-Insured)

OBJECTION TO MOTION FOR MODIFICATION

COMES NOW, the self-insured employer, Ingalls Shipbuilding, Inc., by and through its undersigned attorneys of record, and submits this, its Objection to Claimant's Petition for Modification of the judicial determination in connection with the above referenced claim and in objection to claimant's request for modification, the self-insured employer would submit as follows, to-wit:

I.

That the resolution of the above referenced claim on the merits was fully and finally reached with entry of the Administrative Law Judge's Order Denying Reconsideration which was entered on July 17, 1998. The Judge's decision effectively denied the claim for any additional permanent disability benefits due to the injury of September 24, 1987. Section 22 provides that a claimant

may apply for modification based upon a change of conditions within one year of the last payment of compensation or the denial of the claim. In the case at bar, the employer would submit that the claim for additional compensation was not filed until September 20, 1999. See correspondence with filing date attached hereto as Exhibit "A." Accordingly, the claim for additional compensation was not filed until more than one year after the denial of the claim for additional compensation. Therefore, the claim for additional compensation due to the 1987 injury should be summarily denied as untimely.

II.

That the claimant has failed to prove a change of conditions or a mistake of fact as required by § 22.

III.

That the medical attached to the claim for modification fails to establish a change of conditions or a mistake of fact.

Based upon the foregoing, and other grounds to be raised at a hearing hereon, the employer would assert that the claim for modification of the injury of September 24, 1987, should be denied.

Respectfully submitted, this the 13th day of October, 1999.

INGALLS SHIPBUILDING, INC.

BY: FRANKE, RAINEY & SALLOUM, PLLC

/S/ PAUL B. HOWELL

APPENDIX J

§ 908. Compensation for disability

(f) Injury increasing disability:

(1) In any case in which an employee having an existing permanent partial disability suffers injury, the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of the injury. If following an injury falling within the provisions of subsection (c)(l)-(20) of this section, the employee is totally and permanently disabled, and the disability is found not to be due solely to that injury, the employer shall provide compensation for the applicable prescribed period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater, except that, in the case of an injury falling within the provisions of subsection (13) of this section, the employer shall provide compensation for the lesser of such periods. In all other cases of total permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under subsections (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only. If following an injury falling within the provisions of subsection (c)(l)-(20) of this section, the employee has a permanent partial disability and the disability is found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the

subsequent injury alone, the employer shall provide compensation for the applicable period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater, except that, in the case of an injury failing within the provisions of subsection (c)(13) of this section, the employer shall provide compensation for the lesser of such periods.

In all other cases in which the employee has a permanent partial disability, found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide in addition to compensation under subsections (b) and (e) of this section, compensation for one hundred and four weeks only.

APPENDIX K

§ 922. Modification of awards

Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 908(f) of this title), on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case (including a case under which payments are made pursuant to section 944(i) of this title) in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary. This section does not authorize the modification of settlements.

APPENDIX L

§ 928. Fees for services

(a) Attorney's fee; successful prosecution of claim

If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the duty commissioner, on the ground that there is no liability for compensation within the provisions of this chapter, and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, Board, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

Supreme Court, U.S.
FILED
JAN 14 2000
OFFICE OF THE CLERK

No. 99-1029

In The

Supreme Court of the United States

RENE M. DARBY,

Petitioner,

versus

INGALLS SHIPBUILDING, INC., AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Did the Fifth Circuit properly reject a Petition for Rehearing *En Banc* from a ruling on a non-dispositive motion for attorney fees?

2. Did the Fifth Circuit err in denying attorney fees under § 28(b) of the LHWCA for claimant's unsuccessful prosecution of a claim for an injury, even though claimant subsequently achieved partial success on a separate claim for a later aggravation of the injury?

3. Did the denial of attorney fees constitute an impermissible interference with claimant's right to counsel?

LIST OF PARTIES

The parties to this matter are the following:

1. Rene M. Darby, Petitioner
2. Blewett W. Thomas, Counsel for Petitioner
3. Ingalls Shipbuilding, Inc., which is a subsidiary of Litton Industries, Inc., Respondent
4. Director of the Office of Workers' Compensation Programs, Federal Respondent

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTION 3
STATUTES INVOLVED 4
STATEMENT OF THE CASE 4
ARGUMENT 7
CONCLUSION 21
APPENDIX ..... Resp. App. 1

TABLE OF AUTHORITIES

Page

CASES CITED:

Alaska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 12

Asherman v. Meachum, 957 F.2d 978 (2d Cir. 1992) 9

Butera v. Apfel, 173 F.3d 1049 (7th Cir. 1999)..... 10

Cafeteria & Restaurant Workers Union Local 473, AFL-CIO v. McElroy, 284 F.2d 173 (D.C. Cir. 1960)..... 9

Darby v. Ingalls Shipbuilding, Inc., 99 F.3d 685 (5th Cir. 1996) 1

Farrar v. Hobby, 506 U.S. 103 (1992) 13

Ford Aerospace & Communication Corp. v. Boling, 684 F.2d 640 (9th Cir. 1982)..... 12

General Dynamics Corp. v. Horrigan, 848 F.2d 321 (1st Cir. 1988), *cert. denied*, 488 U.S. 992 (1988) 13

Hensley v. Eckerhart, 461 U.S. 424, 76 L.Ed. 2d 40, 103 S.Ct. 1933 (1983) 13, 14, 15, 16

Hole v. Miami Shipyards Corp., 640 F.2d 769 (5th Cir. 1981).....12, 13

In re Air Crash Disaster Near New Orleans, LA on July 9, 1982, 821 F.2d 1147 (5th Cir. 1987)..... 10

Independent Stevedore Co. v. O'Leary, 357 F.2d 812 (9th Cir. 1966)..... 14

Krakoff v. United States, 431 F.2d 847 (6th Cir. 1970) 10

Martin v. Heckler, 773 F.2d 1145 (11th Cir. 1985) 9

TABLE OF AUTHORITIES – Continued

Page

Metropolitan Stevedore Co. v. Rambo, 521 U.S. 121, 117 S.Ct. 1953, 138 L.Ed. 2d 327 (1997) 2

Murphy v. Honeywell, Inc., 20 BRBS 68 (1986) 13, 20

Strachan Shipping Co. v. Nash, 782 F.2d 513 (5th Cir. 1986) 14, 20

The George Hyman Const. Co. v. Brooks, 963 F.2d 1532 (D.C. Cir. 1992) 13, 15, 17

U.S. Industries/Federal Sheet Metal v. Director, OWCP, 455 U.S. 608 (1982) 15

United States Dept. of Labor v. Triplett, 108 L.Ed. 2d 701, 494 U.S. 715, 110 S.Ct. 1428 (1990) 18, 19

Universal Terminal Stevedoring Corp. v. Parker, 587 F.2d 608 (3rd Cir. 1978) 12

Walters v. National Assn. of Radiation Survivors, 473 U.S. 305 (1985) 17, 18

Wells v. International Great Lakes Shipping Co., 693 F.2d 663 (7th Cir. 1982) 9

Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968) ...14, 20

Yeiser v. Deisart, 267 U.S. 540, 45 S.Ct. 399, 69 L.Ed. 775 (1925) 18

STATUTES CITED:

28 U.S.C. § 1254(1) 3

33 U.S.C. § 901 4

33 U.S.C. § 908(a) 4, 5

33 U.S.C. § 908(b) 4, 17

33 U.S.C. § 908(c) 15

TABLE OF AUTHORITIES – Continued

Page

33 U.S.C. § 908(c)(1) 5

33 U.S.C. § 908(h) 5

33 U.S.C. § 921(b) 5

33 U.S.C. § 921(b)(3) 15

33 U.S.C. § 928 ..... 11, 17

33 U.S.C. § 928(a) 11

33 U.S.C. § 928(b) ..... *passim*

33 U.S.C. § 928(c) 12, 15

33 U.S.C. § 928(e) 17

Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988 13

RULES CITED:

FRAP 16 15

FRAP 35 11

FRAP 35(a) 8

FRAP 47(b) 8

Local Rule 35.1 9

Supreme Court Rule 10 11

OTHER:

20 C.F.R. § 702.131 (1985) 12, 17

20 C.F.R. § 702.133 (1985) 17

20 C.F.R. § 702.134(b) (1985) 17

OPINIONS BELOW

On March 31, 1992, an administrative law judge of the U.S. Department of Labor awarded Rene Darby (Darby) limited temporary compensation and compensation for a scheduled injury to his arm resulting from an accident on September 24, 1987, while Darby was employed by Ingalls. The administrative law judge also awarded Darby's attorney an attorney's fee for the successful prosecutions of those issues.[1] Darby also sought compensation claiming he was permanently totally disabled from such accident.[2] The administrative law judge denied his claim for permanent total benefits. Darby appealed the denial of his permanent total claim. On February 24, 1995, the Benefits Review Board affirmed the denial. The Board also denied Darby's Motion for Reconsideration on November 22, 1995. Darby then appealed to the U.S. Court of Appeals for the Fifth Circuit. On November 13, 1996, the Fifth Circuit affirmed the Board's decision in part and vacated and remanded in part. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685 (5th Cir. 1996). Petitioner's Appendix A-6 – A-13.[3] On April 30, 1998, the administrative law judge entered his order on remand, denying Darby's claim for additional compensation benefits for the 1987 injury. *Id.*, A-14 – A-62. However, the administrative law judge had also consolidated Darby's

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[1] Such fee was paid by Ingalls.

[2] Darby also claimed a neck injury from the September 24, 1987, accident.

[3] Hereinafter "Pet. App." Respondent's Appendix will be cited as "Resp. App." and cites to Employer's Exhibits will be cited as "EX."

claim on remand with his claim for a separate injury which had later occurred at Ingalls on May 8, 1992. *Id.*, A-40.[4] Darby's attorney achieved partial success on the claim against Ingalls for the May 8, 1992, injury (the second claim), and Darby was awarded some continuing compensation and an attorney fee for that accident. However, Darby filed a Motion for Reconsideration seeking nominal continuing benefits for the injury of September 24, 1987 (the first claim), so that the statute of limitations would remain open as to that claim. *See Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 117 S.Ct. 1953, 138 L.Ed. 2d 327 (1997). On July 17, 1998, the administrative law judge denied his request for reconsideration.

Darby's attorney next filed a motion for attorney fees for his unsuccessful appeals to the Benefits Review Board and the Fifth Circuit in connection with the September 24, 1987, accident. On June 11, 1999, a panel of the Fifth Circuit denied such motion. *Id.*, A-1. On July 13, 1999, the panel likewise denied a motion for reconsideration of the denial of attorney fees. *Id.*, A-2. Darby's attorney next attempted to file a petition for rehearing *en banc* with respect to the attorney fee issue, but the petition was returned by the Fifth Circuit clerk because there is no provision for filing an *en banc* petition from a non-dispositive order. Resp. App. 1. Thereafter, Darby's attorney filed a motion for the clerk to accept his *en banc* petition. On August 19, 1999, the Fifth Circuit denied the motion. Pet. App. A-3.

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[4] Claimant had filed a separate claim for the injury on September 6, 1996. *See* Employer's Exhibit 39.

The Benefits Review Board also denied Darby's motion for attorney fees on May 24, 1999. On August 20, 1999, the Board denied Darby's motion for reconsideration on the attorney fee issue. *Id.*, A-68 – A-72. Darby appealed to the Fifth Circuit. Ingalls moved to dismiss the appeal since the Fifth Circuit had already denied Darby's claim for fees in connection with his unsuccessful appeal of the September 24, 1987, claim. On December 2, 1999, the Fifth Circuit dismissed Darby's appeal as frivolous. *Id.*, A-4 – A-5.

It is from the Fifth Circuit's denial of attorney fees, the Fifth Circuit's dismissal of the appeal of the denial of attorney fees by the Benefits Review Board, and the Fifth Circuit's rejection of his petition for rehearing *en banc* that Darby seeks a writ of certiorari from this Court.

JURISDICTION

The orders of the Fifth Circuit denying attorney fees in this case were entered on June 11, 1999, and July 13, 1999. *Id.*, A-1 – A-2. The Fifth Circuit orders denying *en banc* consideration of the ruling on the non-dispositive attorney fee motion were entered on August 2, 1999, and August 19, 1999. *Id.*, A-3; Resp. App. 1. The Fifth Circuit order summarily dismissing the appeal of the Benefits Review Board's denial of fees was entered on December 2, 1999. Pet. App. A-4 – A-5. Jurisdiction of this Court to review the decisions of the Court of Appeals for the Fifth Circuit is conferred by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves an interpretation of the Longshore and Harbor Workers' Compensation Act (hereinafter "LHWCA"), 33 U.S.C. § 901 *et seq.* The specific statute which is pertinent to this matter is 33 U.S.C. § 928(b). Resp. App. 2.

This case also involves a procedural issue in connection with Rule 35 of the Federal Rules of Appellate Procedure and the Fifth Circuit Local Rules with respect to a rehearing *en banc*.

STATEMENT OF THE CASE

Darby was employed as a joiner for Ingalls. On September 24, 1987, he sustained a neck and elbow injury while employed with Ingalls. He was eventually released by his treating physicians with a 15% disability to the arm and permanent limitations due to the cervical condition which prevented him from performing his regular duties. Ingalls accommodated his limitations by placing him in a modified joiner position which paid his regular wage. Notwithstanding his satisfactory performance of the modified job and his receipt of his regular wage, Darby pursued a claim for permanent total disability benefits pursuant to § 908(a) of the LHWCA. He also sought compensation for the scheduled injury to his arm. He continued performing the modified job at his regular wage from October 29, 1990, until the trial on October 2, 1991. Following the trial, the administrative law judge awarded Darby limited additional compensation for temporary disability pursuant to 33 U.S.C. § 908(b) and a

scheduled award for the arm injury pursuant to 33 U.S.C. § 908(c)(1). However, he denied Darby's claim for permanent total disability pursuant to 33 U.S.C. § 908(a), since he found that the modified job provided to Darby was suitable, necessary, permanent, and that his post injury wages exceeded his earnings at the time of injury. The judge also awarded an attorney fee pursuant to 33 U.S.C. § 928(b) for Darby's attorney's successful pursuit of the claim at that level. The additional benefits and attorney fee awarded by the administrative law judge were duly paid by Ingalls. EX 31, p. 2.

Darby appealed the denial of permanent total disability to the Benefits Review Board pursuant to 33 U.S.C. § 921(b), asserting that he was totally disabled from the September 24, 1987, accident despite the fact that he was working regularly. The Benefits Review Board affirmed the denial. Darby subsequently appealed the Board's decision to the Fifth Circuit. Attorney fees were not an issue in such appeal. On November 13, 1996, the Fifth Circuit affirmed in part and remanded in part for the administrative law judge to make a limited determination as to whether Darby's post injury earnings fairly and reasonably represented his wage earning capacity pursuant to 33 U.S.C. § 908(h). Pet. App. A-6 – A-13.

On remand, the administrative law judge found that Darby's earnings did fairly and reasonably represent his wage earning capacity and therefore denied any further compensation for the accident of September 24, 1987. *Id.*, A-40 – A-44. However, to avoid "needless delay . . . ," the administrative law judge consolidated the "relatively minor issue" on remand with a separate claim of Darby arising out of an accident which had occurred on May 8,

1992, while he was performing the modified work. *Id.*, A-40. In his order of April 30, 1998, the administrative law judge found that although Darby was not entitled to any additional benefits for the accident of September 24, 1987, he was entitled to permanent partial disability benefits for the accident of May 8, 1992. *Id.*, A-61.

Darby's attorney filed a motion for reconsideration of the denial of additional compensation for the accident of September 24, 1987. On July 17, 1998, the administrative law judge denied the motion and stated that although no additional compensation was awarded for the September 24, 1987, accident, Darby did receive compensation for the "separate and distinct" injury of May 8, 1992, which was an aggravation of the prior September 24, 1987, injury. *Id.*, A-64.

Darby seized upon the administrative law judge's award of additional compensation for the May 8, 1992, accident, and filed a motion for attorney's fees for time spent on his unsuccessful appeals in regard to his September 24, 1987, accident. On June 11, 1999, the Fifth Circuit denied the claim for attorney fees surrounding the 1987 accident. *Id.*, A-1. On July 13, 1999, the Fifth Circuit likewise denied Darby's motion for reconsideration of the denial of attorney fees. *Id.*, A-2. Darby filed a petition for rehearing *en banc*. The petition was returned to Darby by the clerk since there is no provision for *en banc* review from a non-dispositive order. Resp. App. 1. Darby then filed a motion for leave to file a petition for rehearing *en banc* which was denied by the Fifth Circuit on August 19, 1999. Pet. App. A-3.

Similar to the Fifth Circuit, the Benefits Review Board also denied Darby's claim for attorney fees on May 24, 1999. On August 20, 1999, the Board also denied Darby's motion for reconsideration citing the Fifth Circuit's denial of fees at that level. These orders were appealed to the Fifth Circuit. *Id.*, A-68 – A-72. On December 2, 1999, the Fifth Circuit dismissed Darby's appeal as frivolous, since it had previously found that his attorney was not entitled to similar fees. *Id.*, A-4 – A-5.

It is from the Fifth Circuit's denial of attorney fees, the Fifth Circuit's refusal to re-hear the motion for attorney fees *en banc*, and the Fifth Circuit's dismissal of the appeal of the Board's order denying fees that Darby seeks a writ of certiorari.

ARGUMENT FOR DENYING PETITION FOR WRIT OF CERTIORARI

I.

DID THE FIFTH CIRCUIT PROPERLY REJECT A PETITION FOR REHEARING *EN BANC* FROM A RULING ON A NON-DISPOSITIVE MOTION FOR ATTORNEY FEES?

Initially, Darby argues that the Fifth Circuit erred in rejecting his petition for rehearing *en banc* on the attorney fee issue. He contends that the Fifth Circuit did not have discretion to reject his petition, which deals with a non-dispositive issue. However, neither Rule 35 of the Federal Rules of Appellate Procedure nor the local rules of the Fifth Circuit regarding Rule 35 afford any procedure for seeking rehearing *en banc* under such circumstances. The

Fifth Circuit considers such an attempt by Darby as not rising to the level of exceptional importance as to justify *en banc* review by the entire Fifth Circuit. Resp. App. 1; Pet. App. A-3.

To be clear, the Fifth Circuit may regulate its practice in any manner consistent with federal law, the Federal Rules of Appellate Procedure, and the local rules of the circuit. FRAP 47(b). The procedural rulings of the Fifth Circuit in this case is fully in accordance with Rule 35 of the Federal Rules of Appellate Procedure, the Local Rules of the Fifth Circuit, and federal case law. Rule 35 provides in pertinent part as follows:

> An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:
>
> (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or
>
> (2) the proceeding involves a question of exceptional importance.

FRAP 35(a).

Likewise, the Fifth Circuit's local rules provide as follows:

> Caution. Counsel are reminded that in every case the duty of counsel is fully discharged without filing a petition for rehearing en banc unless the case meets the rigid standards of Federal Rules of Appellate Procedure 35(a). As is noted in Federal Rule of Appellate Procedure 35, en banc hearing or rehearing is not favored. Among the reasons is that each request for en banc consideration must be studied by every

> active judge of the court and is a serious call on limited judicial resources.

Local Rule 35.1.

It is obvious that *en banc* consideration of a one-page unpublished summary denial of attorney fees in this case was not necessary to maintain the uniformity of the decisions of the Fifth Circuit. Likewise, the denial is not a question of exceptional importance. The denial does not even affect Darby's entitlement to benefits, since compensation was paid to him by Ingalls apart from the attorney fee issue. *Wells v. International Great Lakes Shipping Co.*, 693 F.2d 663, 666 (7th Cir. 1982).

There is also no conflict in the circuits. In fact, the circuits are unanimous. In their view, *en banc* consideration of a case is reserved for only the most exceptional of circumstances and it defies logic that the denial of an attorney's fee to a claimant's attorney in a garden variety LHWCA case would justify such extraordinary use of judicial resources. The District of Columbia Court has noted that the power of a court of appeals to rehear a case *en banc* should be exercised sparingly. *Cafeteria & Restaurant Workers Union Local 473, AFL-CIO v. McElroy*, 284 F.2d 173 (D.C. Cir. 1960). The Second Circuit has noted that *en banc* reconsideration is a cumbersome procedure that should not be used more extensively than is necessary and useful. *Asherman v. Meachum*, 957 F.2d 978 (2d Cir. 1992). The Eleventh Circuit has concluded that a court of appeals should not rule *en banc* on issues which do not clearly merit consideration. *Martin v. Heckler*, 773 F.2d 1145 (11th Cir. 1985). The Fifth Circuit has ruled that *en banc* review is reserved for only the most important

federal issues and is prompted by the need for a definitive statement on the law by the full court. *In re Air Crash Disaster Near New Orleans, LA on July 9, 1982*, 821 F.2d 1147 (5th Cir. 1987).

In a case closely on point, the Sixth Circuit has held that *en banc* hearings are ordered only on appeals or other proceedings on the merits and not on preliminary motions. *Krakoff v. United States*, 431 F.2d 847 (6th Cir. 1970). Specifically, in *Krakoff*, the appellant filed a motion for oral argument before that Court *en banc* on a preliminary matter which was the subject of another motion.[5] Similarly, in *Butera v. Apfel*, 173 F.3d 1049 (7th Cir. 1999), the Seventh Circuit noted that the court of appeals is not obligated to reconsider an issue that has previously been resolved before a motions panel of the court. Accordingly, the Fifth Circuit in the present case was not obligated to accept a petition for rehearing *en banc* of the panel's denial of a non dispositive post-judgment motion for attorney fees, which had already been considered and reconsidered by the panel.

Darby argues that the ruling on his motion for attorney fees was a dispositive ruling which may be the subject of *en banc* consideration. To the contrary, his entitlement to attorney fees was not an issue when he appealed to the Fifth Circuit or when the Fifth Circuit rendered its decision on the merits in 1996. Pet. App. A-6 – A-13. Moreover, Darby cannot seriously argue that his motion for attorney fees was dispositive, since the ruling

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[5] There is no logical distinction between a non dispositive preliminary motion and a non dispositive post judgment motion such as we have in the present case.

on the fees did not resolve the underlying case on the merits. To the contrary, it was the underlying ruling on the merits, as supplemented by the decision on remand, which prompted the filing of the motion for fees. Accordingly, there is no logical basis for Darby's assertion that the denial of his attorney fees was a dispositive ruling on the merits which would entitle him to *en banc* rehearing.

Finally, Darby has failed to present any compelling reason, as required by Supreme Court Rule 10, for granting a writ of certiorari in this case. The rulings of the Fifth Circuit are consistent with Rule 35 of the Federal Rules of Appellate Procedure and the corresponding Local Rules of the Fifth Circuit. Moreover, there is no conflict in the circuits on this point and the issue is neither necessary to maintain uniformity of the circuits' decisions nor is it a question of exceptional importance.

II.

DID THE FIFTH CIRCUIT ERR IN DENYING ATTORNEY FEES UNDER § 28(b) OF THE LHWCA FOR CLAIMANT'S UNSUCCESSFUL PROSECUTION OF A CLAIM FOR AN INJURY EVEN THOUGH CLAIMANT SUBSEQUENTLY ACHIEVED PARTIAL SUCCESS ON A SEPARATE CLAIM FOR A LATER AGGRAVATION OF THE INJURY?

The LHWCA provides that an employer is responsible for the claimant's attorney's fees where the claimant utilizes the services of an attorney who is successful in the prosecution of his claim. 33 U.S.C. § 928. Section 28(a) is applicable where the employer has paid no compensation at all. 33 U.S.C. § 928(a). Section 28(b) is applicable

where, as here, the employer has paid some benefits and the claimant seeks additional benefits. 33 U.S.C. § 928(b). In order to be successful under § 28(b), the claimant's attorney must be successful in obtaining greater compensation than the amount previously paid by the employer. 33 U.S.C. § 928(b); *Universal Terminal and Stevedoring Corp. v. Parker*, 587 F.2d 608 (3rd Cir. 1978). Additionally, the Act states as follows:

> If the claimant is successful in review proceedings before the Board or court in any such case an award may be made in favor of the claimant and against the employer or carrier for a reasonable attorney's fee for claimant's counsel in accord with the above provisions. In all other cases any claim for legal services shall not be assessed against the employer or carrier.

33 U.S.C. § 928(b).

A claimant's attorney is entitled to separately petition for an employer-paid fee for work performed before the Benefits Review Board and the court of appeals when his appeal has been successful in obtaining greater benefits. 33 U.S.C. § 928(c); 20 C.F.R. § 702.132 (1985); *Ford Aerospace & Communication Corp. v. Boling*, 684 F.2d 640 (9th Cir. 1982). The intent behind the award of attorney fees in the LHWCA is to assess attorney fee liability on an employer only when the claimant is ultimately successful on the claim. *Alaska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 262 (1975); *Hole v. Miami Shipyards Corp.*, 640 F.2d 769 (5th Cir. 1981). A determination of whether the claim is ultimately successful may require the resolution of an issue on remand before the determination as to

success can be made. *Hole*, 640 F.2d at 774; *Murphy v. Honeywell, Inc.*, 20 BRBS 68 (1986).

Upon conclusion of the remand proceedings, Darby's attorney in the case at bar submitted a fee petition to the Fifth Circuit asserting that since the 1987 injury was "irrevocably intertwined" with the 1992 injury, then he is entitled to recover for time spent on his unsuccessful appeals in connection with the 1987 injury. He cites to this Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed. 2d 40 (1983), regarding the test for awarding attorney fees under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988. The *Hensley* test has also been utilized in cases involving attorney fees under the LHWCA. *See The George Hyman Const. Co. v. Brooks*, 963 F.2d 1532 (D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321 (1st Cir. 1988), *cert. denied*, 488 U.S. 992 (1988). The test under the *Hensley* case for determining a reasonable fee is (1) did the claimant's unsuccessful claims relate to the claims on which he was successful; and (2) did the claimant succeed at a level that makes the hours reasonably expended a satisfactory basis for a fee award. 461 U.S. at 434.

However, the *Hensley* test is only applied after the claimant has prevailed. 461 U.S. at 433. *See also Farrar v. Hobby*, 506 U.S. 103 (1992). The LHWCA reflects that to prevail, the attorney must be successful in obtaining additional compensation. 33 U.S.C. § 928(b). In the case at bar, Darby was unsuccessful in his appeals to the Benefits

Review Board and the Fifth Circuit in connection with the 1987 injury. *Id.*, A-42 – A-44.[6]

Darby did sustain a second injury on May 8, 1992, which resulted in increased work limitations. Although the 1992 injury was an aggravation of the 1987 injury, the aggravation of a prior injury constitutes a new injury making the entire resulting disability compensable. *Strachan Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir. 1986); *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). In other words, but for the 1992 injury, Darby would not have been awarded any additional compensation. Moreover, the mere fact that the 1992 injury incorporated the first injury does not mean that the claim based on the 1987 injury alone incorporated the second injury.

Even if the *Hensley* test is applicable, it is contrary to Darby's position. *Hensley* notes that "where the plaintiff failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee." 461 U.S. at 440. In distinguishing an unrelated claim from a related claim, this Court suggested that a related claim will involve a common core of facts, be based upon related legal theories, counsel's time will be devoted to the litigation as a whole, and it will be difficult to divide the fees on a

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[6] It is only the fees before the Benefits Review Board and the Fifth Circuit which are at issue here. Ingalls paid Darby's attorney's fees for time incurred before the administrative law judge. EX 31, p.2.

claim-by-claim basis. 461 U.S. at 435. None of the foregoing is true in this case. First, the facts presented to the Benefits Review Board and the Fifth Circuit did not include any facts concerning the 1992 injury, which occurred after the record was closed with respect to the 1987 injury claim. Moreover, Ingalls was not required to defend any claim before the Benefits Review Board and the Fifth Circuit other than the claim which was made for the 1987 injury. *U.S. Industries/Federal Sheet Metal v. Director, OWCP*, 455 U.S. 608, 614 (1982). Second, the legal issues presented in the claim for permanent total disability for the 1987 injury are readily distinguishable from those presented in pursuing compensation for the 1992 injury, which was based upon the aggravation of a pre-existing condition. Third, the time of Darby's attorney before the Board and the Fifth Circuit was not devoted to the litigation as a whole. Instead, it was limited to pursuing an unsuccessful appeal based on that record in connection with the 1987 injury alone. 33 U.S.C. § 928(c); 33 U.S.C. § 921(b)(3); FRAP 16. Fourth, the time expended by opposing counsel on the claim for the 1987 injury is easily separable from the time expended on the 1992 claim, since all of the time before the Benefits Review Board and the Fifth Circuit is limited to the record made solely in connection with the 1987 injury.

In *The George Hyman Construction Co. v. Brooks*, 963 F.2d 1532 (D.C. Cir. 1992), the D.C. Circuit ruled that an unsuccessful claim for permanent total disability pursuant to § 908(a) is distinct from a claim for a scheduled award pursuant to § 908(c). 963 F.2d at 1540. In denying fees incurred on the unsuccessful issue, the D.C. Circuit noted that the claims were based on different factual and

legal theories despite the fact that they arose out of the same accidental injury. 963 F.2d at 1540. Accordingly, Darby's unsuccessful pursuit of a claim for a different injury based upon different factual and legal theories would surely qualify as a distinct and unrelated claim.

In *Hensley* this Court noted that "the congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim." 461 U.S. at 435. The foregoing is the exact situation in the case at bar. The claim for the 1987 injury, which was filed on November 8, 1988, was a totally separate claim from the claim filed nearly eight years later for the 1992 injury. *See* EX 9, EX 39.

Darby failed to prevail on his appeal with respect to the 1987 claim, which was separate and distinct from his 1992 claim. The mere fact that the *injuries* were interrelated, since the second injury was an aggravation of the first, does not change the fact that the *claims* were separate and distinct. In fact, the administrative law judge specifically noted in both his Decision and Order Awarding Compensation Benefits and his Order Denying Claimant's Motion for Reconsideration that the claims were separate and distinct, and this finding was never appealed. Pet. App. A-15, A-40, A-58, A-64.

III.

DID THE DENIAL OF ATTORNEY FEES CONSTITUTE AN IMPERMISSIBLE INTERFERENCE WITH CLAIMANT'S RIGHT TO COUNSEL?

The LHWCA provides that a claimant has a right to an attorney. 33 U.S.C. § 928; 20 C.F.R. § 702.131 (1985). Further, the Act provides that if the claimant is successful in obtaining greater benefits than those previously paid, then the claimant is entitled to have his attorney fees paid by the employer. 33 U.S.C. § 928(b); 20 C.F.R. § 702.134(b) (1985); *The George Hyman Const. Co. v. Brooks*, 963 F.2d 1532, 1536 (D.C. Cir. 1992). If the claimant is successful in review proceedings, he may separately apply to the Benefits Review Board or to the Court for the award of an attorney fee for the time incurred before them. 33 U.S.C. § 928(b). In all other cases, the claim for attorney fees is not assessed against the employer or carrier. *Id.*; 20 C.F.R. § 702.133 (1985). The LHWCA also incorporates, however, a provision that prohibits an attorney from receiving a fee unless approved by the appropriate agency or court. 33 U.S.C. § 928(e). Basically, Darby argues that the denial of attorney fees for the separate pursuit of unsuccessful claims which are subsequently consolidated with claims upon which the claimant is partially successful and receives a fee, will drive competent counsel away. Initially, Darby's petition overlooks the heavy presumption of constitutionality which is accorded the Congress in enacting the LHWCA. *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 319 (1985). One challenging the law must make an extraordinary showing of probability of loss of competent counsel under the present

system. *Id.* at 326. Darby has failed to make such a showing.

In *United States Dept. of Labor v. Triplett*, 494 U.S. 715, 110 S.Ct. 1428, 108 L.Ed. 2d 701 (1990), this Court held that a similar challenge to the attorney fee award provisions of the LHWCA failed to rebut the heavy presumption of constitutionality. Specifically, in *Triplett*, an attorney challenged the constitutionality of the attorney fee provision of the Longshore Act which is applicable to black lung claimants, since it deprived claimants of legal assistance in the prosecution of their claims. In upholding the constitutionality of the attorney fee provision of the LHWCA, the Court noted as follows:

> The government pursues an obvious and legitimate interest through the current regime. The regulation of attorneys fees payable by claimants themselves is designed to protect claimants from their "improvident contracts, in the interest not only of themselves and their families but of their public." *Yeiser v. Deisart*, 267 U.S. 540, 541, 45 S.Ct. 399, 400, 69 L.Ed. 775 (1925) (upholding similar state limitation). When fees are payable by persons other than the claimants, as Congress has provided, regulation is designed to assure fairness to the employer, carrier, or trust fund, and to protect those sources from a depletion that would leave other claimants without a source of compensation.

494 U.S. at 722.

Moreover, this Court noted in *Triplett* that the claimant has a substantial burden to prove that limitations on the award of attorney fees make attorneys unavailable to

claimants. Specifically, the Court required that the claimant prove that (1) claimants could not obtain representation and (2) that the inability to obtain representation was due to the attorney fee provision of the Act. 494 U.S. at 722. In *Triplett*, the Court held that the testimony of three lawyers that the current system discourages attorneys from practicing under the Act was held insufficient to meet the burden of proof. 494 U.S. at 723-24. Without question, the naked allegations in Darby's petition are insufficient to challenge the constitutionality of the attorney fee provisions of the LHWCA.

Darby has not had any problem in obtaining counsel. In fact, he obtained the same attorney who pursued his 1987 claim to pursue his 1992 claim. His attorney was duly awarded a fee by the administrative law judge for his partial success on the 1992 claim and that fee is not in issue. He was also awarded a fee for his pursuit of the 1987 claim before the administrative law judge and that fee was paid by Ingalls. It is only the fee for his unsuccessful appeals to the Benefits Review Board and the Fifth Circuit with respect to the 1987 accident which is at issue here.

Darby asserts that the denial of fees for an "irrevocably intertwined" claim would deprive similarly situated claimants of the right to counsel. However, the claim for the 1987 injury was separate and distinct from the claim for the 1992 injury. His partial success in the 1992 claim, for which his attorney has already been awarded attorney fees, did not rely upon his unsuccessful appeals in connection with the 1987 claim. To the contrary, a claim based upon an aggravation compensates the entire resulting disability without regard to the compensability of the

underlying condition. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968). Additionally, where there are two work related injuries, as here, and the second injury aggravates the first, then the second injury becomes the compensable injury. *Strachan Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir. 1986). Moreover, the incorrect assumption of Darby's attorney that he had an ethical obligation to pursue the unsuccessful appeals with respect to the 1987 accident before he could pursue the successful claim for the 1992 accident does not justify the award of attorney fees. *Murphy v. Honeywell, Inc.*, 20 BRBS 68, 71 (1986).

Attorney fees are payable for assisting claimants in recovering additional compensation, not for filing frivolous appeals. Darby's attorney has already been awarded all the attorney fees to which he is entitled. His petition is without any legal or factual basis.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: January 14, 2000

RESPONDENT'S APPENDIX 1

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III **TEL. 504-589-6514**
CLERK **600 CAMP STREET**
NEW ORLEANS, LA 70130

August 2, 1999

Mr. Blewett William Thomas
7115 Dubies Drive
San Antonio, TX 78216

No. 96-60029 Darby v. Ingalls Shipbuilding USDC
No. BRB #92-1547

Dear Mr. Thomas:

We are in receipt of your petition for en banc determination in regard to the above referenced case. In light of there be no provision in the rules from the filing of an en banc petition from a non-dispositive order, your petition is being returned to you unfiled.

Sincerely,

CHARLES R. FULBRUGE III,
Clerk

By: /s/ L. Adams
L. Adams, Deputy Clerk

cc: Mr. Paul B. Howell
Mr. Mark Ambrose Reinhalter

RESPONDENT'S APPENDIX 2

(b) If the employer or carrier pays or tenders payment of the compensation without an award pursuant to section 14(a) and (b) of this Act, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the deputy commissioner or Board shall set the matter for an informal conference and following such conference the deputy commissioner or Board shall recommend in writing a disposition of the controversy. If the employer or carrier refuse to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation, and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation. The foregoing sentence shall not apply if the controversy relates to degree or length of disability, and if the employer or carrier offers to submit the case for evaluation by physicians employed or selected by the Secretary, as authorized in Section 7(e) and offers to tender an amount of compensation based upon the degree of length of disability found by the independent medical report at such time as an evaluation of disability can be made. If the claimant is successful in review proceedings before the Board or court in any such case an award may be

made in favor of the claimant and against the employer or carrier for a reasonable attorney's fee for claimant's counsel in accord with the above provisions. In all other cases any claim for legal services shall not be assessed against the employer or carrier.

33 U.S.C. § 928(b)

Supreme Court, U.S.
FILED
MAR 17 2000
CLERK

(4)

No. 99-1029

In the Supreme Court of the United States

RENE M. DARBY, PETITIONER

v.

INGALLS SHIPBUILDING, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was entitled to an award of attorney's fees under Section 28 of the Longshore and Harbor Workers' Compensation Act for counsel's work during petitioner's appeal of an ALJ decision granting limited compensation benefits for his disability arising out of a 1987 injury, where petitioner did not obtain any additional compensation as a result of the appeal.

2. Whether the denial of a fee award under these circumstances violates equal protection or due process.

3. Whether the court of appeals properly denied petitioner leave to file a petition for en banc review of a non-dispositive order.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	7
Conclusion	14
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Alyeska Pipeline Serv. Co. v. *Wilderness Soc'y*, 421 U.S. 240 (1975)	11
Clark v. *City of L.A.*, 803 F.2d 987 (9th Cir. 1986)	9
Director, OWCP v. *Baca*, 927 F.2d 1122 (10th Cir. 1991)	8
General Dynamics Corp. v. *Horrigan*, 848 F.2d 321 (1st Cir.), cert. denied, 488 U.S. 992 (1988)	10
George Hyman Constr. Co. v. *Brooks*, 963 F.2d 1532 (D.C. Cir. 1992)	10
Hensley v. *Eckerhart*, 461 U.S. 424 (1983)	6, 9, 10, 11
Metrpolitan Stevedore Co. v. *Rambo*, 521 U.S. 121 (1997)	5
United States Dep't of Labor v. *Triplett*, 494 U.S. 715 (1990)	11, 12

Constitution, statutes, regulations, and rules:

U.S. Const. Amend. V	11
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*:	
33 U.S.C. 908	2
33 U.S.C. 908(c)(1)	3
33 U.S.C. 908(h)	3
33 U.S.C. 921(b)(3)	3
33 U.S.C. 921(c)	3
33 U.S.C. 922	5

Regulations and rules—Continued: Page

33 U.S.C. 928 ..... 5, 7
33 U.S.C. 928(a) 7
33 U.S.C. 928(b) 7, 8
33 U.S.C. 928(e) 8
20 C.F.R.:
Section 702.132(a) 5
Section 702.133 8
Section 702.134 8
Fed. R. App. P.:
Rule 35 13
Rule 35(a) 13
Rule 35(b) 13
Rule 35(c) 13
Rule 40(a) 13

Miscellaneous:

H.R. Rep. No. 1441, 92d Cong., 2d Sess. (1972) 8

In the Supreme Court of the United States

No. 99-1029

RENE M. DARBY, PETITIONER

v.

INGALLS SHIPBUILDING, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals in No. 96-60029 denying petitioner's motion for an award of attorney's fees for proceedings before the court of appeals (Pet. App. A1), its order denying petitioner's motion for reconsideration (Pet. App. A2), and its order denying petitioner's motion for leave to file a petition for rehearing en banc of the court's denial of the motion for reconsideration (Pet. App. A3) are unreported. The order of the court of appeals in No. 99-60567, dismissing petitioner's petition for review of the Benefits Review Board's order denying an award of attorney's fees for proceedings before the Board (Pet. App. A4-A5), is unreported. The order of the Board, denying petitioner's motion for reconsideration of its order denying

attorney's fees (Pet. App. A68-A72), is unreported. The Board's order denying attorney's fees is unreported.[1]

JURISDICTION

The order of the court of appeals denying attorney's fees in No. 96-60029 was entered on June 11, 1999. The court of appeals' order denying reconsideration was entered on July 13, 1999, and the order denying leave to file a petition for en banc consideration was entered on August 19, 1999. The petition for a writ of certiorari was filed October 11, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[2]

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, provides compensation to covered employees for work-related injuries that result in disability. 33 U.S.C. 908. Petitioner Rene M. Darby filed a claim for benefits under the LHWCA arising out of an injury he suffered to his neck and elbow in September 1987 while working as a

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[1] The May 24, 1999 order of the Board is reproduced in this brief at App., *infra*, 1a-3a.

[2] The order of the court of appeals dismissing the petition for review in No. 99-60567, entered on December 2, 1999 (Pet. App. A4-A5), which petitioner lists as a decision on review (Pet. 1), is not properly before this Court. Petitioner tendered a petition for a writ of certiorari on October 11, 1999 that was returned for failure to comply with the rules of this Court. Petitioner thereafter tendered a petition for a writ of certiorari that was placed on the docket on December 17, 1999 and deemed filed on October 11, 1999. The December 2, 1999 order was entered after the petition was deemed filed. Nevertheless, because the authority supporting the court of appeals' denial of attorney's fees and the Board's denial of attorney's fees is the same, the federal respondent will address both decisions.

joiner for respondent Ingalls Shipbuilding Corporation. Pet. App. A15, A17, A18. Respondent paid petitioner temporary total disability benefits while petitioner underwent medical treatment and eventually returned him to work in a modified joiner position in 1990. *Id.* at A8, A20, A68.

Petitioner sought additional compensation and medical benefits, claiming among other things that his post-injury position did not constitute suitable alternative employment. Pet. App. A9. In March 1992, after a hearing held in October 1991, an administrative law judge (ALJ) awarded petitioner additional medical benefits, temporary compensation benefits, and a scheduled award for the elbow injury under 33 U.S.C. 908(c)(1). Pet. App. A9, A68-A69. The ALJ, however, also ruled that petitioner's modified duty position was suitable alternative employment and therefore denied permanent total disability benefits. *Id.* at A9. Petitioner appealed to the Benefits Review Board, see 33 U.S.C. 921(b)(3), and the Board affirmed the ALJ's decision. Pet. App. A8.

2. Petitioner sought review of the Board's decision in the court of appeals. See 33 U.S.C. 921(c). The court affirmed the Board insofar as it upheld the ALJ's ruling that petitioner's modified duty position was suitable alternative employment. Pet. App. A9-A13, A69. The court of appeals also held, however, that the ALJ had failed to make a determination that petitioner's post-injury earnings fairly and reasonably represented his wage-earning capacity, see 33 U.S.C. 908(h), and therefore vacated the Board's decision and remanded to the ALJ for the limited purpose of making that finding. Pet. App. A13, A69.

3. On May 8, 1992, during the pendency of the foregoing proceedings, petitioner sustained a second em-

ployment-related injury while working in his modified joiner position. Pet. App. A16, A22, A46. After a period of light duty and voluntary compensation payments by respondent, petitioner filed a second claim for benefits in September 1996 based on the May 1992 injury. *Id.* at A15, A23-A24.

4. The ALJ held another hearing in December 1997. The ALJ had before him the remanded issue regarding the 1987 injury and a new claim stemming from the 1992 injury. The ALJ consolidated the remanded issue with the second claim, noting that the remanded issue was a "relatively minor issue" for which separate proceedings were unnecessary. Pet. App. A40. The ALJ ruled against petitioner on the remanded issue and found that petitioner's actual earnings in the modified duty position reasonably and fairly represented his wage-earning capacity during 1990-1991, when he occupied that position. *Id.* at A17, A40-A44. Accordingly, the ALJ awarded no further relief on the original claim. The ALJ then addressed the second claim, which sought compensation for petitioner's disability after the second injury. *Id.* at A44-A59. The ALJ awarded petitioner compensation for temporary total disability from May 1992 to December 1995, permanent total disability from December 1995 until petitioner became self-employed in August 1997, and permanent partial disability thereafter.[3] *Id.* at A61-A62.

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[3] The ALJ awarded petitioner attorney's fees for work performed before him in the amount of $21,800, plus expenses, after reducing the fee request by 25% to reflect petitioner's limited success. Pet. App. A70 n.1. That award is not at issue in this proceeding, although petitioner appealed the failure to award full fees to the Benefits Review Board. *Ibid.*

Petitioner filed a motion for reconsideration, seeking clarification of whether his two claims had been consolidated as a single cause of action and requesting a de minimis benefits award for his 1987 injury. Pet. App. A63-A64; see *Metropolitan Stevedore Co.* v. *Rambo*, 521 U.S. 121 (1997) (discussing nominal compensation awards). The ALJ denied the motion, stating that the claims had been consolidated for purposes of the hearing and that although the second claim arose out of an aggravation of the original injury, the claims were not a single cause of action and "represented two separate and distinct injuries." Pet. App. A64. As for a de minimis or nominal award for the 1987 claim, the ALJ concluded that the rationale for such awards—to keep open the window of opportunity to file for modification of an award under 33 U.S.C. 922 if "future events or circumstances change a potential disability into an actual one"—was inapplicable in this case because the window for filing a modification request remained open based on the ongoing compensation award on the second claim. Pet. App. A64-A66.

5. Petitioner thereupon filed applications for fee awards under Section 28 of the LHWCA, 33 U.S.C. 928, with both the Benefits Review Board and the court of appeals, seeking fees for his attorney's work before each body for the proceedings reviewing the first ALJ decision on his claim relating to the 1987 injury. Pet. App. A6. See also 20 C.F.R. 702.132(a) (application for attorney's fees shall be made to decision-maker before whom services were performed).

The Benefits Review Board denied the fee petition on the ground that petitioner had not been successful in those review proceedings. App., *infra*, 2a. The Board then denied petitioner's motion for reconsideration. Pet. App. A68-A72. The Board rejected petitioner's

argument that under *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983), he was entitled to fees because the 1987 injury was "interrelated" with the 1992 injury on which his second claim was based. Pet. App. A70. The Board noted that the fact

> that [petitioner's] present loss in wage-earning capacity [(*i.e.*, that which occurred after the 1992 injury)] is due to both the 1987 and 1992 injuries does not make [petitioner] successful for the period of time prior to the second injury, which is the only period of time in question for the attorney services performed before the Board.

Id. at A71. The Board further noted that "although *Hensley* permits a fee for interrelated claims, the claims here clearly [were] severable as the [attorney's] work performed before the Board represents time expended prior to the 1992 injury." *Ibid.*[4]

The court of appeals, without opinion, denied petitioner's application for fees for representation before that court. Pet. App. A1. Petitioner's motion for panel reconsideration was then denied without opinion by order of July 13, 1999. *Id.* at A2. On July 26, 1999, petitioner sought to file a petition for rehearing en banc, which the clerk's office refused to accept because the pleading addressed a non-dispositive order. Pet. 8. When petitioner filed a motion for leave to file the petition for rehearing en banc, the court of appeals denied leave to file, treating the petition as one seeking

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[4] Petitioner petitioned for review of the Board's decision on August 24, 1999. Pet. 2. The court of appeals dismissed that petition, No. 99-60567, as frivolous on December 2, 1999. Pet. App. A4-A5.

en banc review of the July 13 order denying reconsideration. Pet. App. A3.

ARGUMENT

The court of appeals correctly denied petitioner's applications for attorney's fees, and that denial does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted. The order of the court of appeals denying petitioner leave to file a petition for rehearing en banc also presents no circuit conflict and does not warrant review by this Court.

1. Under Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 928, a claimant is entitled to an award of a reasonable attorney's fee for successful prosecution of a claim, including success in review proceedings before the Benefits Review Board or court of appeals. Thus, Section 28(a) of the LHWCA provides that where an employer or insurance carrier declines to pay any compensation after receiving written notice of a claim, and the claimant thereafter "utilize[s] the services of an attorney at law in the successful prosecution of his claim," the deputy commissioner, ALJ, Benefits Review Board, or court, as the case may be, shall award a "reasonable attorney's fee" against the employer or carrier. 33 U.S.C. 928(a). Section 28(b) further provides that where an employer or carrier pays or tenders compensation without an award, but a claimant utilizes an attorney to obtain compensation that "is greater than the amount paid or tendered," then the claimant shall be awarded a reasonable attorney's fee "based solely upon the difference between the amount[s] awarded and * * * tendered." 33 U.S.C. 928(b). Section 28(b) provides as well that "[i]f the claimant is successful in

review proceedings before the [Benefits Review] Board or court in any such case an award may be made * * * against the employer or carrier for a reasonable attorney's fee." *Ibid.* See also 20 C.F.R. 702.134. An attorney may not receive a fee from a claimant unless the fee has been approved by the deputy commissioner, ALJ, Board, or court. 33 U.S.C. 928(e); 20 C.F.R. 702.133.

Section 28's legislative history makes clear that "[a]ttorney[']s fees may only be awarded against the employer where the claimant succeeds, and the fees awarded are to be based on the amount by which the compensation payable is increased as a result of the litigation." H.R. Rep. No. 1441, 92d Cong., 2d Sess. 9 (1972); see also *Director, OWCP* v. *Baca*, 927 F.2d 1122, 1124 (10th Cir. 1991) ("Attorney[']s fees may be recovered [under Section 28] only if the claimant receives increased compensation or other benefit from the action.").

By this measure, the court of appeals' decision to deny petitioner an award of fees for his counsel's work during unsuccessful proceedings before the Board and the court of appeals related to the claim for the 1987 injury is manifestly correct. Petitioner's appeal from the ALJ's first decision sought additional compensation beyond that awarded by the ALJ for petitioner's disability resulting from the 1987 injury. The court of appeals, however, rejected petitioner's argument that the job that he had been provided after his injury was not suitable alternative employment, and the court remanded for a determination of whether his earnings from that job represented his actual wage-earning capacity. While the remand kept petitioner's claim for additional compensation alive, on remand the ALJ ruled against him. Consequently, because petitioner

was not successful in obtaining any additional compensation through resort to the review proceedings, he was not entitled to an award of fees. Pet. App. A1, A71-A72; cf. *Clark* v. *City of L.A.*, 803 F.2d 987, 993 (9th Cir. 1986) (prevailing civil rights plaintiffs' request for their attorneys' fees in pursuit of unsuccessful appeal was appropriately denied where plaintiffs' success derived solely from the trial court ruling and not from appeal).

Petitioner contends (Pet. 16-18) that the denial of fees in this case conflicts with this Court's decision in *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983), because the review proceedings here involved a claim that was "intertwined" with his subsequently successful claim based on the 1992 injury. Under *Hensley*, the fee award of a prevailing party (*i.e.*, one who has prevailed on a significant issue that achieves some of the benefit sought by bringing suit) should be based on attorney time devoted to successful claims, not attorney time expended on unrelated, unsuccessful claims. *Id.* at 434-435. In some instances, claims for relief may share a "common core of facts or * * * be based on related legal theories," and "[m]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." *Id.* at 435. In those instances, the inquiry should focus on the degree of success obtained and the reasonableness of counsel's expenditure of time in relation to the results achieved. *Id.* at 436.

The Board and the court of appeals fully comported with *Hensley* in concluding that the claim pertaining to petitioner's disability resulting from his 1987 injury alone was separate from the claim regarding his later disability resulting from the combined effects of the

1992 and 1987 injuries.[5] The 1992 injury had not yet occurred at the time of the ALJ hearing and decision on the first claim. Thus, neither the facts nor any legal theories of recovery pertaining to the 1992 injury were presented in the first ALJ proceeding or on review by the Board and the court of appeals in that proceeding. Rather, petitioner filed a separate claim with respect to the 1992 injury, while the claim on the 1987 injury was pending before the Fifth Circuit. The ALJ later adjudicated the remanded issue in the same proceeding as the new claim based on the 1992 injury. Pet. App. A40. Thus, in marked contrast to the concern in *Hensley* that counsel's time spent on related claims in a single lawsuit may not always reasonably be divided between successful and unsuccessful claims, petitioner's attorney's work in the unsuccessful review proceedings concerning the 1987 injury claim can easily be separated from his work on the successful claim for the 1992 injury. See *id.* at A64 (ALJ's ruling that the two claims had been consolidated for hearing purposes but "represented two separate and distinct injuries," not "a single cause of action").

In any event, even if the two claims at issue here were deemed to be "related" claims within the meaning of *Hensley*, it would be appropriate to reduce petitioner's fee award in light of his limited overall success in the proceedings. Petitioner sought, but did not obtain, compensation for disability for the period

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[5] Although *Hensley* interpreted a statute providing for attorney's fee awards for prevailing civil rights plaintiffs, the decision's principles are generally applicable to Section 28 of the LHWCA. See *George Hyman Constr. Co.* v. *Brooks*, 963 F.2d 1532, 1536 (D.C. Cir. 1992); *General Dynamics Corp.* v. *Horrigan*, 848 F.2d 321, 325 (1st Cir.), cert. denied, 488 U.S. 992 (1988).

between his assignment to a modified joiner position in October 1990 and the 1992 injury. Denying fees for the review proceedings before the Board and court of appeals—proceedings that were devoted solely to seeking to obtain such relief and did nothing to further his success on the second claim—is a reasonable method of tailoring the fee award to petitioner's level of success. *Hensley*, 461 U.S. at 436-437 (within its discretion to make equitable judgments, a "court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success" in order to ensure that the fee award bears a reasonable relationship to the level of success obtained).

2. Petitioner contends (Pet. 18-22) that review is warranted because the court of appeals' decision denying him an award of fees constitutes an impermissible interference with his right to counsel in derogation of the due process and equal protection guarantees of the Fifth Amendment. Petitioner relies (Pet. 21) on *United States Department of Labor* v. *Triplett*, 494 U.S. 715 (1990), in which the Court considered but rejected a constitutional challenge to a statutory requirement that a payment of attorney's fees by the claimant must be approved by the Board. Nothing in *Triplett* suggests that the Constitution might require the payment of attorney's fees by the claimant's opponent. That fee-shifting requirement is entirely a creature of statute. See *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240 (1975). Moreover, even in the *Triplett* situation, a party, in order to prevail on a constitutional challenge, must overcome a "heavy presumption of [the statute's] constitutionality" by showing that claimants cannot obtain representation and that this unavail-

ability is attributable to the government's fee regime. *Triplett*, 494 U.S. at 721.

Petitioner makes no effort to make the requisite showing under *Triplett*. Nor could petitioner make that showing because he has been represented by counsel throughout these proceedings and, indeed, has received a substantial attorney's fee award pursuant to Section 28 of the LHWCA to reflect his success in proceedings before the ALJ on his claims. See note 3, *supra*. Thus, no constitutional right to the ability to retain counsel has been impaired in this case.

Petitioner's contention (Pet. 19) that, if LHWCA claimants "cannot be assured of payment for successfully prosecuting irrevocably intertwined claims, injured workers may discover that they are no longer able to obtain adequate representation," is not supported by the facts of this case. The court of appeals denied a fee award for attorney representation in review proceedings that were unsuccessful; petitioner received a fee award for his attorney's work in those proceedings that were successful. Petitioner presents no ground to question that the award for successful claims, envisioned by Congress and accomplished in this case, in any way impinges on the right to counsel. Thus, petitioner's constitutional argument does not warrant review by this Court.

3. Petitioner also argues (Pet. 22-24) that this Court should review the court of appeals' denial of his motion to file a petition for rehearing en banc. The court of appeals did not articulate the basis for its ruling, but, on its face, the order treated the petition for rehearing en banc as challenging the panel's July 13, 1999 order denying panel reconsideration, rather than the underlying June 11, 1999 order denying fees. Pet. App. A3. Thus, the petition was viewed as relating only to a non-

dispositive ruling by the panel.[6] See Pet. 8 (Fifth Circuit clerk refused to accept the petition on the ground that it challenged a ruling on a non-dispositive motion). Since the order is silent as to the rationale for the denial, the court of appeals, contrary to petitioner's suggestion (Pet. 24), certainly did not hold that decisions on attorney's fee awards are outside the scope of Federal Rule of Appellate Procedure 35, which governs en banc determinations. In any event, the denial of attorney's fees in this case presents no issue that meets the stringent criteria for en banc review, see Rule 35(a) and (b), and any error by the court of appeals in denying petitioner leave to file a petition for en banc review was therefore harmless. Accordingly, this case presents no issue regarding the construction of Rule 35 that warrants this Court's review.

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[6] Because petitioner apparently tendered the petition on July 26, 1999, Pet. 8, within 45 days of the Court's June 11, 1999 order denying fees, it seems that his petition would have been timely under the Federal Rules of Appellate Procedure for seeking review of that order, had the petition sought such review. See Fed. R. App. P. 35(c), 40(a) (45-day period applies where federal agency is a party).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2000

APPENDIX

U.S. Department of Labor [Seal Omitted]

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 92-1547
Case No. 91-LHC-0049
OWCP No. 6-110624

RENE M. DARBY, CLAIMANT-PETITIONER

v.

INGALLS SHIPBUILDING, INCORPORATED,
SELF-INSURED EMPLOYER-RESPONDENT

[Filed: May 24, 1999]

ORDER

Claimant's counsel has filed a complete, itemized statement, requesting a fee for legal services performed in the captioned appeal, pursuant to 20 C.F.R. §802.203. Counsel requests a fee of $14,984.38 for 85.625 hours of legal services at an hourly rate of $175.00. Counsel also requests $84.96 in expenses. Employer has filed objections to the fee petition and claimant filed a reply to employer's objections.

Employer asserts, initially, that the fee petition is untimely. As a basis for this objection, employer

alleges that counsel should have submitted the fee petition within a reasonable time following the final decision in this case. Alternatively, employer asserts that any fee approved should be awarded at an hourly rate reduced to reflect claimant's limited success. Employer also objects to a request for an enhanced fee and to any time and expenses incurred prior to the filing of the appeal in this case.

Section 802.203 of the Board's Rules of Practice and Procedure, 20 C.F.R. §802.203, provides that a fee petition may be filed within sixty (60) days of the issuance of a decision or non-interlocutory order by the Board. The Board, however, has discretion to accept a fee petition filed outside that time period. We note employer's objection to counsel's delay in filing his fee application but deny the request to strike the fee petition solely upon the basis of its filing date.

Upon review, the Board has determined that claimant did not successfully pursue his claim in this case. Accordingly, counsel is not entitled to a fee for services performed before the Board in this appeal and we deny the application for attorney fees. 33 U.S.C. §928; 20 C.F.R. §802.203.

/s/ BETTY JEAN HALL
BETTY JEAN HALL, Chief
Administrative Appeals Judge

/s/ JAMES F. BROWN
JAMES F. BROWN
Administrative Appeals Judge

/s/ REGINA C. MCGRANERY
REGINA C. MCGRANERY
Administrative Appeals Judge

CERTIFICATE OF SERVICE

92-1547 Rene M. Darby v. Ingalls Shipbuilding, Inc. (Case No. 91-LHCA-0049) (OWCP No. 06-0110624)

I certify that the parties below were served this day.

May 24, 1999 (DATE) /s/ THOMAS O. SHEPHERD, JR.
THOMAS O. SHEPHERD, JR.
Clerk of the Board

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